Petition

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in the Supreme Court of the United States

OCTOBER TERM, 1981

CHARLES G. REBOZO,
Respondent/Cross-Petitioner,

vs.

THE WASHINGTON POST COMPANY,
Petitioner/Cross-Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the mandatory determination by the court of the factual issue of whether a libel plaintiff is a "public figure" deny such libel plaintiff his Constitutional Right under the Seventh Amendment to a trial by jury of all issues of fact.

2. Does the factual nature of the issue of whether a libel plaintiff is a "public figure" make that factual issue particularly inappropriate for summary judgment decision by the court.

3. Did the court below err in determining as a matter of summary judgment that Cross/Petitioner Rebozo was a "public figure."

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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent/Cross-Petitioner CHARLES G. REBOZO (hereinafter "Rebozo") prays that this Court issue a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit, which, in reversing the entry of summary judgment in favor of Petitioner/Cross-Respondent THE WASHINGTON POST COMPANY (hereinafter "the Post"), affirmed the district court's conclusion that for the purposes of this litigation Cross-Petitioner Rebozo was a "public figure."

OPINION BELOW

The opinion of the court of appeals, reported at 637 F.2d 375 (5th Cir. 1981), is printed in the Appendix to this Cross-Petition. (A. 2-19)

JURISDICTION

The court of appeals filed its opinion and entered its judgment on February 19, 1981. A timely petition for rehearing was denied, without opinion on April 29, 1981. Petitioner, The Washington Post, filed its Petition for Writ of Certiorari on July 27, 1981, and Cross-Petitioner Rebozo files this Cross-Petition with reliance upon Rule 19.5, Rules of the Supreme Court of the United States. Three copies of the Petition for a Writ of Certiorari were mailed by Petitioner on July 27, 1981 and received by the Cross-Petitioner on July 30, 1981.

The jurisdiction of this Court in invoked under 28 U.S.C. §1254(1) (1976).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in part, as follows:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

The Seventh Amendment to the Constitution of the United States provides, in part, as follows:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . .

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

Cross-Petitioner Charles G. Rebozo, brought this libel suit in the United States District Court, Southern District of Florida against Cross-Respondent The Post; the actionable publication being an article which appeared in the October 25, 1973 issue of *The Washington Post.* The article, entitled "Bebe Rebozo Said to Cash Stolen Stock" concerned Mr. Rebozo's alleged private dealings within his capacity as President and Chairman of the Key Biscayne Bank, a relatively small South Florida institution. The article is reprinted in its entirety in the Appendix to this Cross-Petition. (A. 19-38)

The district court held at summary judgment that Mr. Rebozo was a public figure "for all purposes and in all contexts" or in the alternative a public figure "for the limited range of issues relating to banking." The court also entered a summary judgment for The Post, finding no genuine issue of material fact with respect to the existence of "actual malice." [Order at pp. 176-177, Printed Appendix filed with United States Fifth Circuit Court of Appeals, below.]

The court of appeals, while reversing the entry of summary judgment for The Post, affirmed the district court's finding that Mr. Rebozo was a public figure "for the purposes of this litigation . . . at the time this article was published," 637 F.2d 375, 380 (5th Cir. 1981).

B. STATEMENT OF THE FACTS

The facts relative to the issue of whether Cross-Petitioner Rebozo was or was not a public figure as of October 25, 1973 when the article in question was published are as follows:

The 1973 article dealt with the 1968 acceptance and later sale of IBM stock held as collateral for a loan at the Key Biscayne Bank of which Cross-Petitioner Rebozo was President and Chairman of the Board. That article had no relation to any national public issue of historic or current interest at the time of publication. [pp. 10-12, Printed Appendix filed with United States Fifth Circuit Court of Appeals below.] Rather, it dealt with testimony in a private civil law suit between the Key Biscayne Bank and the Fidelity and Casualty Company of New York.

Cross-Respondent The Post's real interest in the story was not Mr. Rebozo's involvement in and of itself, but rather his involvement given that Mr. Rebozo was a close personal friend of then President Nixon. This is demonstrated by the testimony of Mr. Kessler, the reporter who wrote the story, who testified on deposition that The Post's interest in Mr. Rebozo existed solely due to his relationship with Mr. Nixon.

At the time of the subject article the Cross-Respondent was in the throws of its now famous Watergate coverage and had vocalized its opposition to President Nixon. Scarcely a day would go by without some new article attacking the President. The subject story, however, had no relation to Mr. Nixon or any of

Mr. Rebozo's dealings or relationship with Mr. Nixon. Rather, it dealt with the handling of a private loan to a totally non-political third party.

In order to demonstrate, for summary judgment purposes, that as of October 25, 1973 Mr. Rebozo was a public figure, The Post filed with the trial court a compendium of articles published by *The New York Times*, *The Miami Herald*, *Newsweek* and *Time*. [Exhibits K, L and M to The Post's Motion for Summary Judgment.]

The majority of those articles were published after the article here in question. The trial judge, upon motion, properly struck from the record all such articles which had appeared after October 25, 1973. [Order at pp. 174-175, Printed Appendix filed with United States Fifth Circuit Court of Appeals below.]

This left for consideration and assistance in determining whether or not Mr. Rebozo was a public figure, a body of articles published prior to October 25, 1973. While those articles refer to Mr. Rebozo, the nature and context of the references is extremely important.

The vast majority of the articles refer to Mr. Rebozo only in passing. They usually refer to him as being (a) with Mr. Nixon and others as a guest at the White House; (b) with Mr. Nixon vacationing on Key Biscayne, the Bahamas, or in California; (c) at Nixon family gatherings; or (d) with Mr. Nixon while shopping, boating, driving or dining.

The next group of articles refers to Mr. Rebozo in the context of his relatives having personal or medical

problems. Then there are articles which simply report that Mr. Rebozo had purchased or sold various pieces of property.

None of foregoing articles, which make up the vast majority of the articles relied on by The Post to prove that Mr. Rebozo was a public figure, relate in any way to any public issue in so far as they refer to Mr. Rebozo. What they do show is that rather than being a public figure, Mr. Rebozo was a painfully private one.[1]

Other than the above, there are a small group of articles which deal with Mr. Rebozo's financial activities related to the President. They include the purchase, financing or improvement of property owned by Mr.

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[1]No one knows what role Mr. Rebozo will play in Nixon's administration. But his best role has seemed to be that of a close-mouthed friend who can keep a secret.

* * *

As for himself, Mr. Rebozo is not saying. He gave one interview back in September. Since then, he has refused to be interviewed and has avoided newsmen.

(Monday, December 23, 1969 issue *N.Y. Times*, Exhibit K to The Post's Motion for Summary Judgment.)

Although he's not as much of a privacy-freak as Howard Hughes, Rebozo has pioneered new frontiers in discretion. Whatever he knows about the President and the First family he's not telling.

(August 20, 1972 issue *Miami Herald*, Exhibit L to The Post's Motion for Summary Judgment.)

Nixon in either California or Florida; and the purchase back from Mr. Nixon of stock he owned in ventures in which Mr. Rebozo had invested. None of the articles in any way refer to any activity of Mr. Rebozo in trying to affect any public issue. Instead, these few articles report on Mr. Rebozo's private financial dealings with the President.

Finally, there are the group of articles which started appearing in the late summer of 1973 relating to the Senate Watergate Committee and other governmental agencies' investigation of the records of the Key Biscayne Bank, Mr. Rebozo and others as they related to the then President Nixon. Almost all of this last group appeared in print at a time relatively contemporaneous with the article here in question. However, the actions of Mr. Rebozo referred to in such articles were in no way related to the private loan and stock sale which gave rise to this litigation and which were reported on in the offending story.

REASONS WHY THE WRIT SHOULD BE GRANTED

The Constitution of the United States not only guarantees the freedom of the press, but it also guarantees the individual's right to a trial by jury in all civil actions recognized at common law.

Historically, this Court has often balanced the rights of parties on the scale of Constitutional guarantees. The case at bar teeters under the burden of guidelines drawn by this Court in *Curtis Publishing Co. v. Butts*, 388 U.S. 139, 87 S.Ct. 1975 (1967), and subsequent cases,

to the detriment of the libel plaintiff's right under the seventh amendment to a trial by jury.

Cross-Petitioner submits the court of appeals erred in affirming the district court's conclusion that for the purposes of this litigation, Mr. Rebozo was a public figure at the time this article was published. 637 F.2d 375, 380 (5th Cir. 1981). There are three bases for this error, and for this Court to grant certiorari.

First, where there may be conflicting inferences to be drawn from the evidence, whether the libel plaintiff is a "public figure", as defined in *Curtis Publishing* and subsequent decisions of this Court, is an issue of fact to be determined by the jury as guaranteed by the seventh amendment. Allowing a court to exercise the role of factfinder on an issue which tends to be dispositive of the entire cause of action would result in the judicial usurpation of the duties of a jury and the violation of the rights of the libel plaintiff.

Second, even if the "public figure" question is an issue to be determined by the court, the court of appeals erred by affirming the district court since the trial court made its determination prior to trial without benefit of the complete evidence and in the face of numerous and substantial conflicting inferences to be drawn from the evidence in this record.

Third, the evidence presented clearly indicated that Rebozo was not a "public figure" for any purpose under the standards and guidelines enunciated by this Court. *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157, 99 S.Ct. 2701 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S.Ct. 2675 (1979); *Time, Inc. v. Firestone*,

424 U.S. 448, 96 S.Ct. 958 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997 (1974); *Curtis Publishing Co. v. Butts, supra.*

I.

WHERE THERE MAY BE CONFLICTING INFERENCES TO BE DRAWN FROM THE EVIDENCE, IT WAS ERROR FOR THE COURT TO DETERMINE THE ISSUE OF WHETHER OR NOT PLAINTIFF WAS A "PUBLIC FIGURE" SINCE SUCH A DETERMINATION VIOLATES THE LIBEL PLAINTIFF'S RIGHT TO A TRIAL BY JURY.

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964), this Court held that the constitutional guarantees of freedom of the press under the first amendment required a federal rule prohibiting a public official from recovering damages

> *for a defamatory falsehood relating to his official conduct* unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. at 279-280 (emphasis added).

While abridging the states' rights to protect its citizenry from damaging publication of libelous statements, this Court reaffirmed this nation's historic commitment to comment and debate on public issues in an "uninhibited,

robust and wide-open" fashion. This Court further noted that such a heritage might well permit discussion which contained "vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270.

The question of who was a public official was not clearly delineated, but courts applying the standards enunciated in *New York Times* could essentially take judicial notice of whether or not the plaintiff in any particular case was a government official.

In a totally separate but equally important and vital vein, the seventh amendment of the Constitution guarantees that in suits at common law where the value in controversy exceeds twenty dollars, a plaintiff is entitled to the right of a trial by jury. The purpose of the amendment was to maintain the right of jury trial as it existed in 1791. *See Parsons v. Bedford*, 3 Pet. 433, 28 U.S. 433 (1830); *In Re: U.S. Financial Securities Litigation*, 609 F.2d 411 (9th Cir. 1979), *cert. denied sub nom., Gant v. Union Bank*, 446 U.S. 929, 100 S.Ct. 1866 (1980).

At common law and for the first 175 years of this nation's history, an individual always had a right to a jury trial in a libel action, wherein the jury would apply state law regarding defamation. *See Ross v. Bernard*, 396 U.S. 531, 533 (1970); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 369-70 (1974); *Munkacsy v. Warner Bros. Pictures Inc.*, 2 F.R.D. 381 (E.D. N.Y. 1942).

However, in 1967, this Court established in *Curtis Publishing Co. v. Butts, supra*, a threshold question of whether or not the libel plaintiff was a "public figure."

Although not specifically designed as a question for judicial determination, the question was answered by the court, based upon the facts of the case; a decision which pre-empted the jury from determining essential facts of a case. This Court reasoned that government power had become more dispersed through the private sector and that individuals in private life could be so "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in the area of concern to society at large," so as to raise an individual to the level of a public figure. *Id.* at 164. This Court in a 5-4 decision further noted that these public figures "often play an influential role in ordering society" and have access to the mass media "to influence policy and to counter criticism of their views and activities." Based upon the foregoing, the Court, per Justice Harlan, held that the public figure plaintiff would have to show "actual malice" as enunciated in *New York Times* in order to recover damages on a libel claim.

One's purposeful activity, this Court noted, which amounts to a "thrusting of one's personality into the vortex of an important public controversy" would qualify as sufficient to render an individual a public figure.[2]

And with that case the Court created a sub-issue in all libel cases; a new issue cut from whole cloth, not

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[2]Much consideration was given to the presence of a "substantial amount of independent public interest" regarding the plaintiff. This position of the Court was further expanded as the basis of determining who was and was not a public figure in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811 (1971). However, the Court has since receded from that position. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997 (1974).

founded in the Constitution and to be determined by the trial court as opposed to the trier of fact in a way so as to do violence to the guarantees of the seventh amendment.

The year before the Court rendered its decision in *Curtis Publishing*, it decided *Rosenblatt v. Baer*, 383 U.S. 75, 86 S.Ct. 669 (1966), wherein the Court reviewed a judgment for the former manager of a county-owned ski resort in New Hampshire on a claim of libel against an area newspaper. The Court found that the evidence in the trial record raised an issue as to whether or not the Plaintiff was a public official under *New York Times*. No explicit determination was made on the plaintiff's status by the Court. Rather it was remanded with the following instructions:

> Because the trial here was had before *New York Times*, we have concluded that we should not foreclose him from attempting retrial of his action. *We remark only that, as is the case with questions of privilege generally it is for the trial judge in the first instance to determine whether the proofs show respondent to be a "public official."*

Rosenblatt at 87-88 (emphasis added).

Justice Black, in his concurring and dissenting opinion, noted the majority phraseology that at retrial the trial judge "in the first instance" was to decide the issue of whether or not the plaintiff was a public official. He continued:

> [s]tatements like this have a way of growing and I fear that the words "in the first instance" will soon be forgotten. When that happens the rule will be that the Federal Constitution forbids states to let juries decide essentially jury questions in libel cases.
>
> * * *
>
> I regret to see the Court take a single step in the direction of holding that a judge rather than the jury is to have the determination of any fact in libel cases.

Id. at 96.

On remand the New Hampshire Supreme Court found that the plaintiff was "entitled to a jury trial on the issue of whether he was a public official." 108 N.H. 368, 371; 237 A.2d 130, 133 (1967).[3]

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[3]The New Hampshire Supreme Court noted that it did not interpret "for the trial judge in the first instance" as requiring such a determination to be made prior to retrial. The New Hampshire court reinforced its holding that the "public official" issue was an issue for jury determination in *Thompson v. Cash*, 119 N.H. 371, 402 A.2d 651 (1979). This was extended to include "public figures" in the case of *McCusker v. Valley News*, ____ N.H. ____, 428 A.2d 493 (1981). The court noted that this Court was concerned with the possibility that the jury would be influenced by the views of the defendant and his publication. However, it stated that "this concern can be dispelled by careful instructions to the jury and by the use of a special verdict . . ." *Id.* at 495.

A number of state supreme courts have taken the warning by Justice Black to heart, holding that the jury is to determine fact questions regarding the status of the plaintiff and the existence of

The impropriety of a court determination on the issue of public figure becomes even more blatant as the Court has evolved the definition of public figure in recent decisions.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1976), this Court reasserted its emphasis on the status of the plaintiff as the determinative element in libel cases rather than the interest of the public as outlined previously by the Court's plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811 (1971). Based solely upon this essential finding, the media defendant is or is not held to a higher degree of care in its reporting and publishing. The opinion of the Court outlines three classifications of public figures: voluntary (general and limited) and involuntary. Those individuals who "occupy positions of such pursuasive power & influence" are deemed "public figures for all purposes and in all contexts." (a voluntary, general public figure) *Gertz v. Robert Welch, Inc., supra* at 351. The more common public figure is an individual who has *"thrust"* himself into "the forefront of particular public controversies in order to influence the resolution of the issues involved." (a voluntary, limited public figure) *Id.* at 351. (emphasis added). The Court also identifies another group (an involuntary, limited public figure) as one who becomes a public figure "through no purposeful activity of his own, but the instances of truly involuntary public figures must be exceedingly rare." *Id.* at 345.

(Footnote 3 Continued)

privilege. *Cahill v. Hawaiian Paradise Park Corp.*, 56 Haw. 522, 543 P.2d 1356 (1975); *Madison v. Yunker*, 589 P.2d 126 (Mont. 1978); *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977).

But most importantly the Court in *Gertz* directs:

> Absent *clear evidence* of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. *It is preferable to reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.*

Id. at 352 (emphasis added).

Using the foregoing language as a foundation, this Court held that an attorney who pursued a litigation matter on behalf of a client, which attracted significant media attention and who had many books and public appearances to his credit, was not a public figure.

In *Time, Inc. v. Firestone, supra*, the Court held that the wife of the scion of a wealthy industrial family, who was prominent in Palm Beach society, who had held press conferences during her divorce proceedings and whose divorce was a cause célèbre, was not a public figure.

Utilizing the guidelines in *Gertz*, the *Firestone* opinion reasoned that she was not a public figure because other than in Palm Beach society, she did not thrust herself to the forefront of any controversy; her judicial proceedings were not to be considered a public controversy, even though the divorce of wealthy individuals may be of interest to the public; and she

had not assumed a role of "especial prominence in the affairs of society."

In *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), it was held that a research behavioral scientist who had obtained government funding for his aggression studies was not to be considered a public figure under *Gertz* and *Firestone*.

Hutchinson had been successful in obtaining the grants, had had his successful applications for federal funds reported in local papers and had his name appear in the paper pursuant to the alleged libel. Although he was a published author, the Court noted that he did not have regular and continuing access to the media, "one of the accouterments of having become a public figure." *Id.* at 136.

In *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157 (1979), an author named plaintiff as a Russian spy, reporting plaintiff's alleged connection or involvement in the 1940s and 1950s with Soviet espionage. Wolston failed to appear before a grand jury and was cited for contempt.

This Court held that plaintiff was not a public figure. The Court refused to label Wolston a public figure because of this "minor role in whatever public controversy" there may have been regarding the investigation of Soviet espionage. Likewise, the Court declined to hold that failure to appear before a grand jury and a subsequent contempt citation is enough to render plaintiff a public figure "for purposes of comment on the investigation of Soviet espionage."

Wolston, the Court concluded, was probably "dragged unwillingly into the controversy," had never discussed the proceeding with the press and had essentially returned to the private life he had prior to the issuance of the grand jury subpoena. *Id.* at 166.

The Court specifically noted that Wolston's failure to appear before the grand jury and the citation for contempt, while newsworthy, are not dispositive of the public figure issue. A private person will *not* be transformed into a public figure just by "being involved in or associated with a matter that attracts public attention." *Id.* at 167.

To allow the jury to make this public figure determination where conflicting inferences may be drawn from the evidence, just as it makes the "actual malice" determination, would not do any violence to the constitutional guarantees of the first amendment. It would, however, give back to the individual the right to a jury trial in libel actions; a right which is now clouded and obstructed by the judicial determination of a pre-emptive issue. Nothing in the Constitution states that the court must make the determination of whether plaintiff is a public figure under the standards created by the Court in the interest of a free press. Such a requirement is solely Court-created and exists as an aberration on the common law right to a jury trial in libel actions.

A trial by jury does not mean an abandonment of the constitutional standards outlined by the Court for the last seventeen years. Rather it is a trial by a jury

> . . . in the presence and under the superintendance of a judge empowered to instruct them on the law and to advise them on the facts, and . . . to set aside their verdict if in his opinion it is against the law or the evidence.

Capital Traction Co. v. Hof, 174 U.S. 1, 13-14 (1899).

The Court's determination of the public figure issue is an outgrowth of the Court's concern for the protection of publishers' first amendment rights to a free press. The first amendment, however, does not demand such a court determination at the expense of the public's right under the seventh amendment to a jury determination of fact issues. Holding that the libel plaintiff has a right to jury determination of all issues, would bring balance back to the scales that have long favored the rights of the press under the first amendment at the expense of the sacred right of the individual to a jury trial under the seventh amendment.

A jury determination of all issues in a libel action where the first amendment's freedom of the press is concerned is analagous to a jury determination in obscenity cases where the first amendment's freedom of speech sets the boundaries and guidelines for determination of what is obscene. *See Smith v. United States*, 431 U.S. 291, 97 S.Ct. 1756 (1977); *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887 (1974); *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607 (1973). The jury in an obscenity case has the discretion to determine what appeals to prurient interests and what is patently offensive according to community standards. *Smith v. United States, supra.* "The mere fact juries may reach

different conclusions as to the same material does not mean that constitutional rights are abridged." *Miller v. California, supra* at 26, n. 9.

Even if the Court finds that the determination of the public figure is a mixed question of law and fact, again the obscenity analogy would be relevant. As Judge Skelly Wright noted in *Reed Enterprises v. Corcoran*, 354 F.2d 519 (D.C. Cir. 1965):

> The question in each case as to whether a particular publication is obscene is a mixed one of law and fact. The Supreme Court in Roth [v. United States, 354 U.S. 476, 77 S. Ct. 1304 (1957)] held that it was a question which should be submitted to the jury to be determined under proper instructions.

Id. at 522.

Where there are conflicting inferences which may be drawn from the evidence, as is the case here [*see also* Point II, *infra*] the public figure issue can and must be determined by a jury as provided by the seventh amendment.

II.

APPLYING THE STANDARDS AS OUTLINED BY THIS COURT, THE COURT OF APPEALS ERRED IN FINDING THAT MR. REBOZO WAS A PUBLIC FIGURE AT THE TIME THE ARTICLE IN QUESTION WAS PUBLISHED FOR THE PURPOSES OF THIS LITIGATION.

Cross-Petitioner submits that he is neither a public figure for all purposes nor a limited public figure under the definitional guidelines enunciated by this Court in numerous cases since *Curtis Publishing Co. v. Butts, supra.*

In *Gertz v. Robert Welch, Inc., supra,* a public figure for all purposes was defined as an individual who occupies a position of "persuasive power and influence." Mr. Rebozo, whose most distinguishing attributes are his professional pursuits as chairman of the board of a relatively small Florida bank and his friendship with former President Richard M. Nixon, is unquestionably not an all purpose public figure under the *Gertz* definition. Conceivably, a court could find the Chairman of the Board of Chase Manhattan or Bank of America to be an all purpose public figure because of his "persuasive power and influence." However, so finding the chairman of the board of a small, relatively obscure Florida bank would be beyond the intention of this Court in *Gertz.*

Likewise, there is no support in decisions of this Court for the proposition that a good friend of the then-President of the United States is a public figure for all purposes.[4]

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[4]The court of appeals below specifically declined to decide "whether a confidential relationship with the President of the United States automatically converts one into a public figure." 637 F.2d 375, 379 (1981). To answer this question in the affirmative would be tantamount to determining that every President's private banker, personal attorney, close friends, relatives, personal accountant, and minister would be public figures for all purposes. Such a construction would be contrary to the rationale of this Court throughout the last seventeen years.

Certainly the public has a keen curiosity about all leaders and their private lives and friends. However, the Court has repeatedly repudiated its *Rosenbloom* "public interest standard." In *Wolston, supra*, this Court stated that even though stories may be newsworthy and attract media attention that fact in and of itself is not conclusive of the public figure issue.

> A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention.

Wolston at 167.

Richard Kessler, the author of The Post's article, stated in his deposition of May 5, 1976 that the article in question would not have been written as it was, had it not been for Mr. Rebozo's connection with Mr. Nixon. Kessler testified as follows:

> Q. Would the story be of any interest to you as a Washington Post reporter if Mr. Rebozo had not been a friend of Mr. Nixon's?
>
> A. The same precise story?
>
> Q. Yes sir.
>
> A. If he had nothing to do with Mr. Nixon?
>
> Q. That is right. If he had been a joe from Boon Docks, U.S.A.
>
> A. Not as the story is written, no.

* * *

Q. I am asking if your interest in Mr. Rebozo was based on the fact that Mr. Rebozo was a personal and financial friend of Mr. Nixon?

A. That's right.

(Kessler deposition May 5, 1976, pp. 138, 140-141).

Just as Mr. Rebozo is not a public figure for all purposes, the facts of this case, viewed in the perspective of recently enunciated guidelines concerning limited public figures clearly indicate that regarding his activities with the Key Biscayne Bank Mr. Rebozo is not a limited public figure for the purposes of this case.

This Court has indicated that there are two classifications of the limited public figure: voluntary and involuntary. As the *Gertz* opinion noted:

> [h]ypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, *but the instances of truly involuntary public figures must be exceedingly rare.*

Id. at 345.

The record here does not support a finding that Mr. Rebozo was one of those "exceedingly rare" involuntary public figures.

For Cross-Petitioner Rebozo to be a voluntary limited public figure the Court would have to make the determination that he either, through his purposeful activity thrust himself into the "vortex of an important public controversy" (*Curtis Publishing Co.*), "in order to influence the resolution of the issues involved" (*Gertz*), "engaged the public in an attempt to influence" the resolution of the issues involved (*Wolston*), or assumed an "especial prominence" (*Gertz*). Not one of those items are present in this case.

As "emphasized" in *Gertz* and *Wolston*, the most important consideration that a court must focus on is the

> nature and extent of an individual's participation in the particular controversy giving rise to the defamation.

Gertz at 352; *Wolston* at 167.

The Washington Post article, written in 1973, focused on allegations regarding alleged activities of Mr. Rebozo at the Key Biscayne Bank concerning the cashing of stolen stocks in 1968. Information from a deposition taken in prior civil litigation was utilized as a source in the article. The deposition, according to the article became available in late 1971 when it was placed in the civil court file in the case of *Fidelity & Casualty Company v. Key Biscayne Bank*, Case No. 70-619-Civ-JLK (S.D. Fla. 1972), *aff'd*, 501 F.2d 1322 (5th Cir. 1974).

Mr. Rebozo's involvement in the lawsuit certainly could not be considered voluntary by any stretch of the imagination. "It might be more accurate to say that

petitioner was dragged unwillingly into the controversy." *Wolston v. Reader's Digest Ass'n, Inc.* at 166.

This Court has held that there is no finding of public figure status where (a) an attorney voluntarily associates himself with a case which guarantees extensive media coverage because of the nature of the action (*Gertz*), or (b) an individual chooses not to appear before a grand jury even if he knows that such failure to respond to a subpoena may result in publicity (*Wolston*), or (c) a member of Palm Beach society utilizes the court system to obtain a divorce, even if the proceedings are titillating and considered a cause célèbre (*Time, Inc. v. Firestone*). In *Firestone* this Court noted that even though all court proceedings contain some informational value implicating the first amendment, this is little more than labelling judicial proceedings matters of "public or general interest" and, therefore, not enough to create a public figure. *Id.* at 906.

> And while participants in some litigation may be legitimate "public figures," either generally or for the limited purpose of that litigation, the majority will more likely resemble respondent, drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them *or to defend themselves against* actions brought by the State or by others. There appears little reason why these individuals should substantially forfeit that degree of protection which the law of defamation would otherwise afford them *simply by virtue of their being drawn into the courtroom.*

Id. at 966-967 (emphasis added).

Weighed on any scale Mr. Rebozo cannot be considered a limited public figure at the time of this article, concerning this article or for the purposes of this litigation.

The court of appeals erred in affirming the district court's finding that Mr. Rebozo was a public figure. Obviously, the name recognition of the Cross-Petitioner, because of his friendship with former President Nixon, one of the most controversial and media exposed Presidents in modern history, served as the foundation for the court's holding. However, as outlined above, support for such a holding can not be found in the language and guidelines offered by this Court.

The decision of the appeals court strains to place Mr. Rebozo in a public figure niche. The basis for the court's attempt can certainly be appreciated, i.e., allowing The Post "breathing space" for robust discussion on something arguably close to the Presidency. The Court's efforts unfortunately are misplaced and unsupportable.

The Post had no interest in Mr. Rebozo but for his relationship with the President. In fact, The Post made no prior attempt to report on the case involving the Key Biscayne Bank even though the case had been filed in 1970 and Mr. Riley's (the investigator) deposition had been placed in the court file some two years prior to the article's publication. The article was not a contemporaneous piece on the litigation, but rather an article with historical flavor, reporting events from five years earlier.

The article was only of contemporaneous interest because of the media assault on the struggling, under-seige President's problems.[5]

Under the all purpose public figure test—"persuasive power and influence" (as well as under public official test) the President is an important focus for the press. To avoid the problem which the court of appeals had with the categorization of Mr. Rebozo, using as assistance the guidelines of this Court, new considerations or balances may be needed.

When individuals with persuasive power and influence, such as the President, interact with other "private" individuals, the press has an obligation to report on their activities with, e.g., the President. For the purpose of that activity, and in keeping with this Court's rationale in past cases, the court should recognize a "zone or sphere of influence" to allow the press "breathing space" to comment. Any individual who expressly or impliedly injects himself into this "sphere" by associating with, e.g., the President would be a limited public figure for the purpose of media comment upon the activities which take place within the sphere. In addition, this "zone of influence" would only exist as to the contemporaneous activities which occurred while the one party was an all purpose public figure.

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[5]Justices Blackman and Marshall noted in *Wolston* that a reporter and historian operate under differing time constraints and that one may be a public figure "for the purposes of contemporaneous reporting of a controversial event, yet not be a public figure for purposes of historical commentary on the same occurrence." *Id.* at 169.

A review of the articles in which Rebozo is mentioned, published prior to October 25, 1973 by numerous papers and magazines, deal with Rebozo only in the context of his existence within Mr. Nixon's sphere of influence.

Utilizing this test, which conflicts with no holdings of this Court, would only serve to define what is now a grey area and clarify for the press the scope of inquiry of all purpose public figures who, in turn, would be covered by the "actual malice" test of *New York Times.*

Under this test Mr. Rebozo would be a limited public figure for all activities in which he was involved with President Nixon and while thrust into the President's sphere of influence. It would not extend to the reporting of an article about Mr. Rebozo, such as here, where he was clearly outside of Mr. Nixon's sphere, dealing with his and his bank's own private business matters.

For the purposes of this litigation, Mr. Rebozo was not a public figure at the time the article in question was published.

III.

BECAUSE OF THE CONFLICTING INFERENCES TO BE DRAWN FROM THE EVIDENCE, THE COURT OF APPEALS ERRED IN FINDING THAT REBOZO WAS A PUBLIC FIGURE PRIOR TO TRIAL.

Alternatively, Cross-Petitioner submits that the district court, confronted with conflicting inferences to be drawn from the evidence, should have accepted and weighed more evidence before determining the issue

of whether or not Rebozo was a public figure. The court of appeals' affirmance was in error.

Utilizing the guidelines from this Court's decisions, the district court needed additional information in order to determine Rebozo's status. The court should have heard additional testimony regarding Rebozo's relationship with the President, as well as Mr. Rebozo's strong affinity for privacy.

As Mr. Rebozo testified at his deposition on November 29 and 30, 1977:

> A. . . . I am a very private person, and my nature is to not have everyone know all my business.

Id. at 8.

> Q. Did there come a time, sir, when you stopped being a private person, in your view?
>
> A. I am still a private person.

Id. at 18.

The fact that Richard Nixon happened to become President is not enough to bootstrap Mr. Rebozo up to public figure status, without the court hearing additional evidence. Mr. Rebozo testified:

> [w]e were friends for many years. He happened to become President. We were friends throughout eight years he wasn't even in public life.

Id. at 46.

Whether or not Mr. Rebozo was a public figure based on his "influence" with the President is unsubstantiated. Cross-Petitioner testified that he "didn't play any role with [Nixon]." *Id.* A court would have to hear testimony from former President Nixon as to the amount of Mr. Rebozo's influence. The court cannot construe influence in this case based solely on access to one who has influence.

The *Gertz* test is the beacon to which the court of appeals should have steered its decision, i.e., the

> nature and extent of an individual's participation in the particular controversy giving rise to the defamation.

Gertz at 352.

The record is clear that Mr. Rebozo did not *thrust* himself into any controversy which was the subject of the defamation. The article in question dealt solely with the handling of a private loan to a totally unrelated, non-political third party. At best, the court should have heard additional testimony so as to be in a better informed position regarding Mr. Rebozo's activities at the Key Biscayne Bank concerning the allegations in the article.

To decide that Mr. Rebozo was a public figure flies in the face of the evidence thus far adduced in the proceedings.

The Court erred by making the public figure determination at a stage where there were conflicting inferences to be drawn from the evidence. More evidence was necessary to make such a determination.

CONCLUSION

For the foregoing reasons, the cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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Charles G. REBOZO,
Plaintiff-Appellant-Cross Appellee,

v.

The WASHINGTON POST COMPANY,
Defendant-Appellee-Cross Appellant.

No. 78-3403.

United States Court of Appeals,
Fifth Circuit.

Feb. 19, 1981.

Appeal from the United States District Court for the Southern District of Florida.

Before WISDOM, RONEY and HATCHETT, Circuit Judges.

RONEY, Circuit Judge:

This is an appeal from a summary judgment entered for the defendant newspaper in a defamation suit. The district court found that plaintiff was a public figure and that no genuine issue of material fact existed as to whether defendant acted with actual malice. We affirm the court's finding that plaintiff is a public figure. We reverse, however, as to the decision that there was no genuine issue of material fact on the question of whether defendant acted with actual malice in publishing the newspaper article that forms the basis of this suit, and remand for further proceedings.

I. *FACTS*

Because the case was decided on defendant's motion for summary judgment, we must construe the record most favorably to plaintiff. *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157, 162 n.5, 99 S.Ct. 2701, 2705 n.5, 61 L.Ed.2d 450 (1979); *Time, Inc. v. Ragano*, 427 F.2d 219, 221 (5th Cir. 1970).

In June 1973 Ronald Kessler, a reporter with substantial financial and reporting experience for defendant's newspaper, *The Washington Post*, was assigned by his editor to prepare a series of articles on the finances of then-President Richard M. Nixon. As part of his preparation Kessler became interested in plaintiff Charles G. Rebozo because of his relationship with the former President. Rebozo had been, and continues to be, a close friend and financial adviser of the former President, and serves as chairman of the board and president of the Key Biscayne Bank in Miami.

Newsday, a Long Island, New York, newspaper in 1971 had published a series of articles about Rebozo, one of which described a Miami lawsuit involving allegations that the Key Biscayne Bank had converted 900 shares of stock belonging to E.F. Hutton & Co. Some of the stock had apparently been pledged as collateral for a loan at the Key Biscayne Bank, and was later sold when the loan was called. During the course of his investigation, Kessler reviewed the file in the case, which by that time was pending in this Court on appeal, in order to determine whether it contained any subsequent unreported developments. See *Fidelity & Casualty Co. v. Key Biscayne Bank*, No. 70-619-Civ-JLK (S.D.Fla. Jan. 24, 1972) (order granting defendant's motion

for directed verdict), *vacated and remanded*, 483 F.2d 438 (5th Cir. 1973), *dismissed* (S.D.Fla.1973), *aff'd*, 501 F.2d 1322 (5th Cir. 1974).

Among other things Kessler studied the deposition of George H. Riley, Jr., who had been retained to investigate a claim filed by E.F. Hutton with its surety, the Fidelity and Casualty Company of New York. In his deposition, Riley described a meeting he had with Rebozo in October 1968 as follows:

Q Did you tell Mr. Rebozo at that time that the stock had been stolen or was missing from E. F. Hutton & Co.?

A Yes, sir.

Q Can you recall exactly what you told him?

A As I previously stated, I advised Mr. Rebozo that I was investigating the theft of nine 100-share certificates from the vaults of E. F. Hutton & Co. in New York.

Q Did you advise him of the numbers of the certificates that you were investigating?

A Yes. And the numbers corresponded to the numbers he gave me.

It is undisputed that 300 shares of the stock were sold on November 13, 1968, although the parties differ on whether the stock was sold by the Key Biscayne Bank itself, or on Rebozo's personal account.

After Kessler read the court file in Miami and New Orleans, he called Riley on the telephone because, as Kessler described, "I wanted, somehow to get a feeling from him, at least as to whether he understood the possible significance of his testimony." Kessler recounted a portion of his telephone conversation with Riley as follows on deposition:

Q Did you specifically ask him whether his statement in the deposition concerning his conversation with Mr. Rebozo was accurate?

A No.

Q Why not?

A I attach great significance to testimony given under oath and most newspaper articles, of course, are based on statements that are not made under oath. So, when a reporter obtains statements that are made under oath, it is certainly of more significance than otherwise.

Q It would have been significant, wouldn't it Mr. Kessler, if Mr. Riley told you he had made an error or a misstatement in his sworn testimony?

A Yes.

Q You didn't think it important to find out whether he would say whether he was right or wrong in that statement?

A No.

Q You didn't want to know what he wanted to say on that issue?

[Objection omitted]

Kessler also contacted Rebozo's attorney, who told him Rebozo "flatly denies" that Riley told Rebozo during their October 1968 meeting that the stock was stolen. The attorney followed up the conversation with a letter, repeating that Riley's testimony was false in that respect.

The question whether Rebozo personally, or the Bank, had cashed the stock was the subject of an October 6 internal memorandum from Kessler to his *Post* editor, Harry Rosenfeld, prompted by the telephone conversation between Kessler and Rebozo's attorney. A portion of that memorandum states:

> So who cashed the stock? Neither Rebozo nor other witnesses were asked this question in the depositions. There are no other legal papers in the court file to answer the question.
>
> But there are copies of the bills, receipts, and checks covering the sale transaction. As is clear from the attached, they all bear Rebozo's name.
>
> * * * * * *
>
> The fact that Rebozo's name appears on them, and that the transactions were executed on his personal account, appear to me to be more than sufficient evidence for the purposes

of an accurate and fair newspaper account of what appears in the court file that Rebozo technically and substantively cashed the stock.

Kessler and Rosenfeld discussed the content of an article Kessler had prepared on the stock transaction, and reviewed the sources of the information contained in the article.

On October 25, 1973, *The Washington Post* published a front-page article containing the headline, "Bebe Rebozo Said to Cash Stolen Stock," accompanying a photograph of plaintiff, and the following four paragraphs:

> Charles G. (Bebe) Rebozo, President Nixon's close friend, cashed $91,500 in stolen stocks in 1968 after he was told by an insurance investigator it was stolen, the investigator's sworn statement and other records in a Miami court file indicate.
>
> A lawyer for Rebozo conceded the investigator visited Rebozo but said Rebozo "flatly denies" the investigator told him the stock was stolen.
>
> The $91,500 in securities represented 300 of the 900 shares of International Business Machines Corp. stock that federal prosecutors say was stolen by the Mafia in 1968 from the vaults of E. F. Hutton & Co., a New York stock brokerage firm.
>
> The stock came into Rebozo's possession when it was offered as collateral for a loan

from Rebozo's bank, Key Biscayne Bank in Florida.

The story continued for a total of 126 paragraphs, with the balance of the article appearing on pages A14 and A15 of defendant's newspaper. The "main point" of the story, according to Kessler, was contained in the "lead," or first paragraph. Farther along in paragraph number 99, the *Post* article quoted the passage from investigator Riley's deposition, in which Riley was questioned about whether the stock "had been stolen *or was missing.*" (emphasis added).

Rebozo's complaint contends the article's lead sentence is false in two respects: (1) the investigator did not tell him the stocks were stolen; and (2) the stocks were cashed by the bank, not by him. The question of the article's falsity, however, is not an issue in this appeal.

II. *WAS REBOZO A PUBLIC FIGURE?*

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the Supreme Court held that a public official cannot recover damages for defamation relating to official conduct absent a showing of " 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80, 84 S.Ct. at 725-26. Three years later the Court held in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), that the *New York Times* standard is applicable to "public figures" as well. *See also Associated Press v. Walker*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094

(1967). The Court elucidated the applicability of *New York Times* to public figures, but refused to expand the protection afforded by that standard to actions brought by private persons, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-47, 94 S.Ct. 2997, 3009-10, 41 L.Ed.2d 789 (1974).

Application of the *New York Times* rule to public figures, the Court observed, is supported by two factors. First, public figures, because they "enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements that private individuals normally enjoy," are less vulnerable to injury from defamatory statements. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 344, 94 S.Ct. at 3009; *see Wolston v. Reader's Digest Association, Inc.*, 443 U.S. at 164, 99 S.Ct. at 2706. A second consideration, and one that has been given greater weight by the Court, is that public figures, the news media may assume, "have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 345, 94 S.Ct. at 3009. The Court went on to describe two ways in which a person may become a public figure for first amendment purposes.

> For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.

418 U.S. at 345, 94 S.Ct. at 3009. *See also Wolston v. Reader's Digest Association, Inc.* 443 U.S. at 164, 99 S.Ct. at 2706; *Time, Inc. v. Firestone*, 424 U.S. 448, 453, 96 S.Ct. 958, 964, 47 L.Ed.2d 154 (1976). Thus, under the analysis suggested in *Gertz v. Robert Welch, Inc.*, two types of public figures emerge: Those who are public figures for all purposes, and those who are public figures for a limited range of issues.

The district court held as a matter of law that plaintiff "had achieved such pervasive fame and notoriety as of . . . the date of publication . . . that he had become a public figure 'for all purposes and in all context' " (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. at 351, 94 S.Ct. at 3012). Our review of this conclusion requires that we consider, first, whether plaintiff's purported status as a public figure is appropriate for decision on summary judgment and, second, whether the evidence considered in a light most favorable to plaintiff, shows him to be a public figure for the purposes of this litigation.

[1] The Supreme Court has on numerous occasions, treated the public figure and public official questions as matters of law, for the trial court to decide. *See, e.g., Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789; *Rosenblatt v. Baer*, 383 U.S. 75, 88, 86 S.Ct. 669, 677, 15 L.Ed.2d 597 (1966). This Court has observed in this same context that "where undisputed facts admit to but one conclusion, then, on motion for summary judgment, the court properly decides the issue." *Rosanova v. Playboy Enterprises, Inc.*, 580 F.2d 859, 862 (5th Cir. 1978). Even if summary judgment were improper because of issues of fact that

could only be resolved after evidentiary hearing, the trial court, not a jury, must determine whether the evidence showed that plaintiff was a public figure. *Brewer v. Memphis Publishing Co.*, 626 F.2d 1238 (5th Cir. 1980). In the absence of conflicting inferences to be drawn from the record in this case, we conclude the district court was justified in considering the public figure question on summary judgment.

[2] The record in this case contains sufficient undisputed facts to show that Rebozo, at the time of publication, was a public figure. As is well known, Rebozo was President Nixon's closest friend while Nixon was in the White House. While this in and of itself has considerable significance, we need not decide whether a confidential relationship with the President of the United States automatically converts one into a public figure, since the record indicates Rebozo had in other ways voluntarily exposed himself to the risk of close public scrutiny.

Rebozo played a substantial role in the former President's financial affairs, acting as the President's agent in the management of the President's bank accounts at the Key Biscayne Bank, and in the purchase of two homes. Plaintiff also played a role in the purchase and sale of other investments for the former President. In addition Rebozo's relationship with the President was not confined to counseling on business and financial matters. Rebozo freely admitted he offered his opinions to President Nixon on various matters, and transmitted to the former President the views of other important people on certain policy matters. The two discussed the Watergate situation when it began to arise in late 1973.

More significantly for purposes of this case, Rebozo played an active role in the President's 1972 re-election campaign, helping to arrange major contributions for the President's political benefit. The Senate Select Committee on Presidential Campaign Activities, the so-called Watergate Committee, investigated closely Rebozo's role in the 1972 campaign and his involvement in President Nixon's finances, eventually publishing five volumes of data describing Rebozo's connections with the former President and his campaign.

Press coverage of Rebozo has focused both upon his relationship to the President and upon his own business and personal affairs, although the public's interest in his activities has certainly been enhanced by his connections with the former President. The record indicates that during the six months prior to October 25, 1973, the date of the *Washington Post* article, *The New York Times* published 48 articles mentioning Rebozo, while *The Miami Herald* published 76. Prominent stories in 1968 and 1971, in *The New York Times* and *Newsday*, described Rebozo's business and financial dealings in some detail. Rebozo himself recognized, "[W]hen you are traveling in the circles that I have traveled in, there are press people all over the place."

In view of the foregoing, Rebozo, met, as a matter of law, both *Gertz v. Robert Welch, Inc.*, public figure considerations. First, he "enjoy[ed] significantly greater access to the channels of effective communication and hence [had] a more realistic opportunity to counteract false statements than private individuals enjoy." 418 U.S. at 344, 94 S.Ct. at 3009. There is evidence in the record that following publication of the *Post* article,

both *The Miami Herald* and a major television network published Rebozo's response.

Second, on the basis of his voluntary activities, "the communications media [were] entitled to act on the assumption" plaintiff "had voluntarily exposed [himself]" to the risk of close public scrutiny. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 345, 94 S.Ct. 3009. Rebozo's activities—including his association with President Nixon, taking part in his financial affairs, and involvement with the re-election effort—made him a prime subject of public comment.

Accordingly, we affirm the district court's conclusion that for the purposes of this litigation plaintiff Rebozo was a public figure at the time this article was published.

III. *WAS THE MALICE QUESTION APPROPRIATE FOR RESOLUTION ON SUMMARY JUDGMENT?*

The district court, having decided that plaintiff was a public figure, applied the correct standard of liability but held there was no genuine issue of material fact on the question of "actual malice," as defined by *New York Times Co. v. Sullivan*, 376 U.S. at 279-80, 84 S.Ct. at 725-26. Because we conclude that the facts in this case, taken in a light most favorable to Rebozo, raised such an issue of fact, we reverse the summary judgment entered for defendant.

[3] In *New York Times Co. v. Sullivan*, the Supreme Court held the First Amendment precludes recovery by a public official for defamation unless the plaintiff can prove the statement was made with actual malice.

A person has acted with actual malice when a statement is made with knowledge that it was false, *New York Times Co. v. Sullivan*, 376 U.S. at 279-80, 84 S.Ct. at 725-26, or with a high degree of awareness of the statement's probable falsity, *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964), or with reckless disregard of whether the statement was false or not, *New York Times Co. v. Sullivan*, 376 U.S. at 279-80, 84 S.Ct. at 725-26. *See Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 724 (5th Cir. 1980); *Long v. Arcell*, 618 F.2d 1145, 1147 (5th Cir. 1980). The Supreme Court has further defined the phrase "reckless disregard":

> There must be sufficient evidence to permit the conclusion that the defendant in fact entertained *serious doubts* as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968) (emphasis added). *See* Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 Va.L.Rev. 1349, 1370-75 (1975). Recklessness cannot be inferred, however, from the mere combination of falsehood and the defendant's general hostility toward the plaintiff, nor may reckless disregard be inferred from negligence. *Greenbelt Cooperative Publishing Association, Inc. v. Bresler*, 398 U.S. 6, 10, 90 S.Ct. 1537, 1539, 26 L.Ed. 2d 6 (1970); *St. Amant v. Thompson*, 390 U.S. at 731, 88 S.Ct. at 1325.

The parties argue at some length as to whether summary judgment is a "peculiarly appropriate vehicle

for the disposition of libel suits governed by the actual malice standard of *New York Times.*" Appellee's brief at 30. In all candor, there is a certain amount of confusion in our cases on this question. Some of our cases have recognized that the plaintiff's standard of proof on the actual malice issue is higher than other issues and have thus concluded that actual malice is "an issue which lends itself to summary judgment." *E.g., Southard v. Forbes, Inc.*, 588 F.2d 140, 146 (5th Cir. 1979), *cert. denied*, 444 U.S. 832, 100 S.Ct. 62, 62 L.Ed.2d 41 (1980). Other cases have suggested that the need under the First Amendment to protect publishers from the chilling effect of a long and expensive trial justifies a presumption in favor of summary judgment. *See Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 864-65 (5th Cir. 1970); *Time, Inc. v. McLaney*, 406 F.2d 565, 566 (5th Cir. 1969). Other cases, however, have recognized that actual malice refers to the mental state of the defendant with respect to the truthfulness of the allegedly defamatory material and that "[p]roof of such a mental state must usually be inferred from circumstances difficult to develop on motion for summary judgment." *Vandenburg v. Newsweek, Inc.*, 441 F.2d 378, 380 (5th Cir.), *cert. denied*, 404 U.S. 864, 92 S.Ct. 49, 30 L.Ed.2d 108 (1971). *See also Time, Inc. v. Ragano*, 427 F.2d 219 (5th Cir. 1970). Even those cases strongly urging summary judgment describe it as proper only where the record is "devoid of genuine issues of fact" on the actual malice question. *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d at 865.

In view of this uncertainty, it is appropriate to examine closely the recent Supreme Court authority related to this inquiry. The subjective nature of the evidence a plaintiff must rely on was emphasized by

the Supreme Court in *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979), where it was held that "any direct or indirect evidence relevant to the state of mind of the defendant," *id.* at 165, 99 S.Ct. at 1643, could be used to support plaintiff's burden of showing actual malice with convincing clarity. The implications of this holding with respect to summary judgment disposition were noted in a case decided that same term, *Hutchison v. Proxmire*, 443 U.S. 111, 120 n.9, 99 S.Ct. 2675, 2680 n.9, 61 L.Ed.2d 411 (1979):

> Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called "rule." The proof of "actual malice" calls a defendant's state of mind into question, *New York Times Co. v. Sullivan*, 376 U.S. 254 [84 S.Ct. 710, 11 L.Ed.2d 686] (1964), and does not readily lend itself to summary disposition. See 10 C. Wright & A. Miller, Federal Practice and Procedure §2730, pp. 590-592 (1973). Cf. *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979).

Herbert v. Lando also casts serious doubt on the notion that the chilling effect of a long and expensive trial justifies a presumption in favor of summary judgment, at least to the extent that such a presumption exceeds the balance struck between the rights of publishers and defamation plaintiffs in *New York Times v. Sullivan*. The Court reiterated that the First Amendment does not provide a publisher complete immunity and that if "inhibition flows from the fear of damages liability for publishing knowing or reckless falsehood, those effects are precisely what *New York Times* and other cases have held to be consistent with

the First Amendment." 441 U.S. at 171, 99 S.Ct. 1646, 60 L.Ed.2d 115. While the Court recognized the burden and expense of pre-trial discovery in First Amendment defamation cases, that was not enough, it held, to modify the standard set in *New York Times v. Sullivan*. 441 U.S. at 175-77, 99 S.Ct. 1648-49, 60 L.Ed.2d 115.

Laying aside the suggestion that the potential chilling effect of the burdens of litigation are in and of themselves grounds for preferring summary judgment, an idea repudiated by *Herbert v. Lando*, the cases in this Circuit can be reconciled. These cases stand for the principle that the standard of review in First Amendment defamation actions, as in all summary judgment cases, is whether the record, construed in a light most favorable to the party against whom the judgment has been entered, demonstrates there are genuine issues of fact which, if proven, would support a jury verdict for that party. Since, however, a jury verdict in a defamation case can only be supported when the actual malice is shown by clear and convincing evidence, rather than by a preponderance of evidence as in most other cases, *Brewer v. Memphis Publishing Co.*, 626 F.2d 1238, 1258 (5th Cir. 1980), the evidence and all the inferences which can reasonably be drawn from it must meet that higher standard.

[4] On this record we conclude the district court was confronted with a genuine issue of material fact on the details of investigator Riley's conversation with Rebozo, and reporter Kessler's review of it. In investigating the story, even though Kessler went to the trouble of calling Riley, he failed to review with Riley the words in Riley's earlier deposition upon which Kessler eventually based the article's lead. Regardless

of whether Riley knew at the time of his conversation with Rebozo whether the pledged stock had in fact been stolen, the seminal question may be what Riley actually told Rebozo before the stock was sold to cover the loan. We note in passing that on the second appeal in the conversion case, the Court found that not until December 1968, nearly two months after the stock sale, did E. F. Hutton learn that the stock involved in this case was among those shares that had been missing from its vault. *Fidelity & Casualty Co. v. Key Biscayne Bank*, 501 F.2d 1322, 1324 (5th Cir. 1974). Despite Kessler's professed belief in the veracity of Riley's deposition testimony, Kessler's resolution of the obvious ambiguity whether Riley told Rebozo the stock was (a) missing, (b) stolen, or (c) missing or stolen, in favor of the most potentially damaging alternative creates a jury question on whether the publication was indeed made without serious doubt as to its truthfulness. *St. Amant v. Thompson*, 390 U.S. at 732, 88 S.Ct. at 1326.

There is, moreover, a material question of fact suggested by Kessler's October 6, 1973 memorandum to his editor, in which the reporter expressed uncertainty about whether the Key Biscayne Bank or Rebozo himself cashed the stock. Kessler stated in that memorandum that if the bank, rather than Rebozo, had actually cashed the stock, the article's proposed lead paragraph would have to be modified. This memorandum, plus the fact that Kessler resolved the uncertainty expressed in it in such a way as to cast plaintiff Rebozo in the worst possible light and to make for Kessler a front-page story of an episode which otherwise might not have commanded any significant attention, when taken in a light most favorable to Rebozo, could amount to evidence of the reporter's reckless disregard for the truth or

falsity of the assertion that "Charles G. (Bebe) Rebozo, President Nixon's close friend, cashed $91,500 in stolen stock . . . ." *See St. Amant v. Thompson*, 390 U.S. at 731-32, 88 S.Ct. at 1325-26; *New York Times Co. v. Sullivan*, 376 U.S. at 279-80, 84 S.Ct. at 725-26. Thus we cannot say "the record is devoid of genuine issues of fact as to whether the alleged defamatory statement was published with actual knowledge of its falsity or with reckless disregard of whether it was true or false." *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d at 865. Accordingly, the district court's summary judgment on the question of actual malice is reversed and the case is remanded for further proceedings.

REVERSED AND REMANDED.

The Washington Post, October 25, 1973

Bebe Rebozo Said to Cash Stolen Stock

By Ronald Kessler
Washington Post Staff Writer

Charles G. (Bebe) Rebozo, President Nixon's close friend, cashed $91,500 in stolen stocks in 1968 after he was told by an insurance investigator it was stolen, the investigator's sworn statement and other records in a Miami court file indicate.

A lawyer for Rebozo conceded the investigator visited Rebozo but said Rebozo "flatly denies" the investigator told him the stock was stolen.

The $91,500 in securities represented 300 of the 900 shares of International Business Machines Corp. stock that federal prosecutors say was stolen by the Mafia in 1968 from the vaults of E. F. Hutton & Co., a New York stock brokerage firm.

The stock came into Rebozo's possession when it was offered as collateral for a loan from Rebozo's bank, Key Biscayne Bank in Florida.

In a civil suit filed against the bank by Hutton, Rebozo said in a deposition that he gave the loan at the request of an old friend, Walter A. (Jake) Jernigan.

The loan was given to a friend of Jernigan's.

In a deposition taken under oath, George H. Riley Jr., an insurance investigator with Continental Insurance Cos., said he attempted to tell Rebozo the stock was stolen in October, 1968, but Rebozo twice canceled the appointments.

During this time, records in the court file show, Rebozo was in the process of selling 600 of the 900 shares of stock and of receiving the proceeds of the sale.

Riley said that when he finally met with Rebozo and told him the 900 shares was stolen, Rebozo claimed he had already sold them.

However, the records in the court file show Rebozo did not sell the remaining 300 shares until more than a week after Riley's visit.

After the visit, Riley filed a report on the interview with his head office in New York. In it, he said Rebozo "did not talk freely" and Riley suspects Rebozo was aware the transaction was "shady."

Eight persons, four of them identified by prosecutors as members or associate members of the Mafia, were indicted in 1970 for conspiring to steal the stock. Except for a defendant who is a fugutive from justice and another who was placed in an insane asylum, all were convicted the following year.

When the indictments were announced, the Justice Department's Organized Crime Strike Force in Miami said no evidence had been developed that Rebozo was involved in the plot or was aware the stock was stolen.

It was not until after the criminal case was completed in late 1971 that Riley's deposition was entered in the civil suit court file. The contents of the deposition have never been previously reported.

Asked what he would do if there were evidence that Rebozo was told the stock was stolen before he sold it, Dougald D. McMillan, chief of the Strike Force, said:

"If we have evidence of a federal criminal offense involving anyone, we will pursue it, and if warranted, present the evidence before the grand jury."

Federal law provides a fine of up to $10,000 or a prison term of up to 10 years, or both, for anyone who knowingly stores, sells, disposes of, or accepts as collateral

for a loan securities in interstate commerce that have been stolen or unlawfully converted.

Rebozo is Mr. Nixon's close friend. Based on publicly known transactions, he is Mr. Nixon's second-biggest benefactor, after their mutual friend, Robert H. Abplanalp.

Rebozo, born in 1912 in Tampa, Fla., of Cuban parents, had been in a succession of small businesses, beginning with a gasoline station and tire recapping business. Later, he operated laundromats and a small loans company.

Since Mr. Nixon became President in 1969, Rebozo has shown up frequently in his financial and personal affairs. He visits Mr. Nixon at his Camp David retreat, at his San Clemente home, and at the Bahamian Island owned by Abplanalp.

Rebozo was recently in the news as the recipient of $100,000 in cash said to be a campaign contribution from Howard Hughes to Mr. Nixon. However, the cash was delivered in 1969 and 1970, when Mr. Nixon was not in a campaign.

Rebozo's home in Key Biscayne is adjacent to Mr. Nixon's two homes, which were purchased with the help of Rebozo's lawyer and officer in his bank, Thomas H. Wakefield.

Abplanalp also serves as a director of Rebozo's bank in Key Biscayne.

The bank, chartered by the state and insured by the Federal Deposit Insurance Corp., opened its doors

March 10, 1964, with Rebozo as chairman, president, and a stockholder. It is the only bank on the island.

Why this particular bank was chosen to give the loan that was secured by the stolen IBM stock is a mystery.

The borrower, Charles L. Lewis, had no account at the Key Biscayne Bank. An Atlanta investor, Lewis also had no business or residence in Miami.

Rebozo said in his dispostion in the civil court file that he was told that the reason Lewis wanted the loan from his bank was that he planned to open a business in Miami and wanted to establish a banking "connection" there.

However, Lewis never did open a business in Miami.

The story of the loan transaction, as told by the participants in their depositions in the court file, began when Jernigan called Rebozo and asked if he would give a $195,000 loan using stock as collateral to his friend and associate, Lewis.

The idea behind pledging stock as collateral for a loan, as Lewis did to get a loan from Rebozo's bank, is not unlike the idea behind a home mortgage loan or a car loan.

If the borrower defaults on his payments, the bank can sell the stock, home, or car to pay off the loan. The procedures for obtaining such loans also are not dissimilar, bankers say.

The borrower normally visits the bank and makes out an application. He states the reason he wants the money. Normally, the bank requires that the applicant live in the area and have an account at the bank.

The bank checks the applicant's credit, usually through a credit bureau. It also checks to make sure the collateral—home, car, or stock—is legally the property of the applicant.

If all the requirements are met, the borrower is notified and comes in for his money.

These procedures are familiar to anyone who has taken a bank loan. They differ markedly from those used by Rebozo, the court papers indicate.

After Jernigan proposed the loan to Rebozo on the telephone, Jernigan and Lewis visited the bank on July 30, 1968. Within several hours, the court documents indicate, they applied for the loan, gave the stock as collateral, and received the money through a checking account opened in Lewis' name the same day.

The $195,000 loan was payable at $10,000 per quarter or on the demand of the bank. The interest rate was 7½ per cent per year.

A copy of the loan application filled out by a bank loan officer shows some spaces were left blank, including "recommendations of loan committee."

The copy of the application lists as collateral 900 shares of IBM stock computed at $338.75 per share, or a total of $304,875.

Wakefield, Rebozo's lawyer and an officer in the bank, said in his deposition in the court file the loan committee had given tentative approval to the loan a week earlier in a telephone poll. He said the committee did not know at the time exactly what type of collateral was being offered to secure the loan.

The loan application lists as the purpose of the loan, "Business needs—(Nationwide A/L) & buy out other party." Nationwide Airlines was a small airline of which Lewis was an officer.

Although the Federal Reserve Board, which regulates stock loans, says loan officers must be aware of the purpose of a loan, Rebozo said he had never heard of the airline listed, and he said he did not ask the name of the other party who was to be bought out.

Lewis swore in a Federal Reserve form that the statement made on the loan application was the true purpose of the loan, but he later acknowledged in his deposition that the money was not used for this purpose. Instead, Lewis said, he gave most of the money to representatives of "Henry Sturgeon," who, according to prosecutors, turned out to be fictitious.

Lewis said Jernigan was aware the money was going to Sturgeon rather than for the purpose Lewis had claimed, but the bank was not.

The testimony of Rebozo and others involved indicates no check was made on Lewis' background through a credit bureau. Instead, Rebozo said, he called Lewis' office in Atlanta to verify that he had an office.

After the money was given to Lewis, Rebozo said he felt he should make additional checks. He called F. Donald Nixon, the President's brother, because he lived in Newport Beach, Calif., were Lewis said he had another office, Rebozo said.

Rebozo said he asked the brother to "check the local bank out there to see if there was anything wrong with this fellow. And he phoned, checking back in Newport Beach."

Rebozo did not say what, if anything, Donald Nixon reported back, nor why he called Donald Nixon instead of the bank in Newport Beach.

Donald Nixon, a vice president of Marriott Corp., the hotel and restaurant chain, did not return a reporter's telephone calls.

The only other information Rebozo said he had about Lewis was that he had been introduced by Jernigan, who vouched for his reputation. Rebozo said he did not have Jernigan cosign the note obligating Lewis to repay the loan.

When a bank gives a mortgage loan, it determines that the house is legally the property of the borrower by having a lawyer or title insurance company search the land records covering the house. If the collateral for a loan is a car, the bank requires a bill of sale or title certificate.

When stock is used as collateral, the ownership normally is self-evident, because the stock certificates list the owner's name and address on the face.

The name of the owner is not always listed. Sometimes the certificates are issued in the name of the stock brokerage house that ordered them. The brokerage house keeps the stock until the owner orders it sold.

When stock is issued in this form, it is called "street name" stock. Street name stock may be requested by a stock brokerage customer if he intends to sell the stock quickly or wishes to conceal his ownership of it. If he buys the stock on credit, it must be in the street name.

Whatever the reason, bankers and stock brokers say, a customer who owns street name stock and wants to use it as collateral for a loan invariably transfers it to his own name before he presents it to the bank.

The reason is that it is difficult for a bank to tell who is the owner of the stock if it is in street name. Some banks, such as Bankers Trust Co. in New York, say they refuse to give any loans for street name stock. A vice president for security at the bank says the risk that the stock is stolen is too great.

Other banks, such as Chase Manhattan Bank in New York, say they will accept street name stock only if the borrower is a long-standing customer and if he presents evidence that the stock is his.

This evidence may be a letter or transfer slip saying the stock was transferred to the customer from the broker. The bank can then call the broker to verify that the transfer took place. This is done by citing the customer's account number listed on the transfer form.

The stock that Lewis offered as collateral for the $195,000 loan from Rebozo's bank was in street name, the name of E. F. Hutton. Rebozo said he noticed this fact, but he said the only evidence he asked for or obtained that Lewis was the owner of the stock was Lewis' statement that he owned it.

Lewis said in his deposition that he was never asked if he owned it.

Rebozo said he also noticed that the stock had been issued two years earlier, and he said he asked Jernigan how Lewis had obtained it. Jernigan said he got it in a stock swap. Rebozo said he never asked the name of the person with whom Lewis had swapped the stock.

"It was of no concern," he said. "Swap stock, people do it all the time, and they swap value for value."

Rebozo said he accepted the stock and had it transferred to Lewis' name. The next day, however, Rebozo said he had second thoughts about the stock, and he or Wakefield made calls to IBM and Hutton.

Rebozo said he also called James M. Crosby, chairman of Resorts International, Inc., which owns a gambling casino on Paradise Island off the coast of Nassau in the Bahamas.

He said he called Crosby, a friend, to get help in checking out the stock. Resort [sic] International owns Intertel, an investigative agency.

Rebozo said Crosby called IBM to determine if the stock was stolen.

Wakefield said he asked a man at Hutton if he thought the stock certificates sounded counterfeited, based on Wakefield's description over the telephone of the color of the certificates and the appearance of the signatures.

Wakefield said the man, whose name he did not know, said the securities sounded as if they were genuine.

An IBM employee said in a deposition in the court file that he checked to see if the stock was stolen and reported to Rebozo that it was not.

Thomas P. Lynch, executive vice president of Hutton, said there was no way for IBM to know whether the stock was stolen. He said this was because Hutton did not know at the time it was missing.

Lynch said Hutton and other brokerage houses do not count the stock in their vaults daily. Between checks, he said, stock may be taken without anyone knowing.

For this reason, he said, the only way a bank can tell that a borrower owns street name stock is to ask him for his account number with the broker and to call the broker.

"He (Rebozo) did everything except what he was supposed to do," Lynch said.

Lynch said it also is unusual for a bank to give such a large loan on street name stock.

Two of the country's largest banks, First National City in New York and Chase, said they would consider a $195,000 loan to be large and would take unusual precautions when giving it.

The two banks' assets of $37.3 billion and $26.1 billion, respectively, compare with $7.7 million for Rebozo's bank in 1968. (Because of the loan's size, Rebozo's bank shared it with another Miami bank.)

The Hutton firm eventually discovered that the stock was stolen, and the FBI traced it in early October to Rebozo's bank. Lynch said it was traced from IBM records showing the bank had the stock transferred to Lewis' name.

Prue C. Clinkscales, an FBI agent, visited the bank and looked at its file on the loan, but according to Rebozo, Clinkscales praised him for making checks on the stock.

"I asked him if there was anything wrong with the stock," Rebozo said, and Clinkscales replied, "We don't have any knowledge of that; we were just asked to see your files."

Attempts to determine if Clinkscales knew the stock was stolen, and if so, why he did not tell Rebozo, were unsuccessful. Agent Clinkscales told a reporter he had no comment and would not listen to any questions.

Rebozo said that "immediately" after the visit from Clinkscales, he decided to cancel the loan.

Asked why, he said, "Actually, from the beginning some of the directors didn't like the loan. They thought that since the man didn't live and work in our community, and since the fact that it was in street name originally, and we had to go through all this effort to do it . . . I had gone on the assurances that he was going to establish a business in Miami, and expected him to maintain a compensating balance in accordance with general banking procedures. And the combination of circumstances that ensued dictated it would be prudent to call the loan."

Wakefield noted that a state banking examiner had criticized the bank for making such a large loan to someone outside the bank's geographic area.

"I said, couple that (the FBI inquiry) with what the bank examiner's comments had been, I thought we ought to call the loan," Wakefield said.

If Rebozo had canceled the loan and it had been repaid from Lewis' own funds, there would have been no loss to Hutton. But a telegram from Rebozo to Lewis dated Oct. 7, 1968, shows Rebozo gave Lewis two days to come up with the money.

Lewis said in his deposition that he told Rebozo he could not get the money "in the period of time that he was willing to give us (Lewis and his business associates)."

Rebozo was not asked in his deposition why he allowed Lewis only two days to pay off the loan.

Whatever the reason, Lewis did not come up with the cash. Rebozo decided to sell the stock that had been put up as collateral, causing the loss to Hutton, which owned the stock.

Rebozo sold 600 of the 900 shares, producing $196,984 which was enough to pay off the loan. He continued to hold the remaining 300 shares.

Records in the court file show the first batch of stock was ordered sold Oct. 8, 1968, and the check for the proceeds was dated Oct. 17.

Riley, the insurance investigator, said in his deposition that he visited the bank on Oct. 12 or 13, after he was asked by his New York office to determine if Rebozo's bank had Hutton's stock. Hutton was insured by Riley's company.

Riley said he told the bank's loan officer he was there to investigate some stolen securities, but the officer said only Rebozo could discuss the matter.

Riley said he made appointments with Rebozo for Oct. 14 and 17, but each time they were canceled.

"On at least one occasion," he said, "his (Rebozo's) secretary stated that he was busy, and it was during the time of the Nixon campaign, and this was the excuse; that he was too busy to see me," Riley said.

The second appointment was canceled the day the check for the proceeds of the first 600 shares of stock was issued.

Five days later, Riley met with Rebozo. Riley said he told Rebozo at this meeting on Oct. 22 that he wanted to determine if the bank had the stolen stock.

Riley said Rebozo told him he already had given all the information to the FBI. However, Riley said Rebozo did show him the certificate numbers of the stock as they appeared before the stock was transferred to Lewis' name.

The questioning of Riley in his deposition continued:

Q. Did you tell Mr. Rebozo at that time that the stock had been stolen or was missing from E.F. Hutton & Co.?

A. Yes, sir.

Q. Can you recall exactly what you told him?

A. As I previously stated, I advised Mr. Rebozo that I was investigating the theft of nine 100-share certificates from the vaults of E. F. Hutton & Co. in New York.

Q. Did you advise him of the numbers of the certificates that you were investigating?

A. Yes. And the numbers corresponded to the numbers he gave me.

The next day, Riley wrote in a report to his New York office that Rebozo claimed he already had sold all the stock.

The report was supported by a deposition of Riley's superior, who said Riley gave him an oral rundown on the interview after it took place.

In the report, Riley said, "It should be pointed out that I do not believe Mr. Rebozo was giving me all the information available to him and he would not go get his file . . . This would appear to me to be a shady deal, and I suspect that Mr. Rebozo is aware of this and did not want to become involved, which accounts for his reluctancy in his discussion with me. He did not talk freely, and the information that was obtained was difficult to extract."

Asked in his deposition why Rebozo would not get his file on the loan, Riley said, "I can say that Mr. Rebozo didn't even want to give me the time of day, let alone get his file."

Asked in a telephone interview if prosecutors were aware of his testimony, Riley, an insurance investigator 20 years, said not to his acknowledge [sic]. He declined to discuss the case further.

Rebozo did not return repeated telephone calls from a reporter. Rebozo's lawyer, Alan G. Greer, told The Washington Post that Rebozo "flatly denies" having been told the stock was stolen. Greer said Riley met with Rebozo, with only Rebozo and Riley present, and that Riley did not say the stock Greer said Riley met with Rebozo [sic], was stolen.

The court files show that a day after Riley's visit, Rebozo wrote to Lewis to ask him if he wanted the remaining 300 shares of stock sold. The letter enclosed

Lewis' note, marked "paid," meaning Lewis no longer was under obligation to the bank.

The letter to Lewis closed this way:

"Everything thus far has worked out well for both of us and if I receive any further information with respect to the matter involving the certificates, I will let you know immediately."

Asked in his deposition what this meant, Rebozo said, "That must have been in reference to the inquiries made (by the FBI)."

The remaining 300 shares were ordered sold Oct. 31, more than a week after Riley's visit to Rebozo. The check was dated Nov. 13.

Rebozo's lawyer, Greer, said in a telephone interview that the stock was sold by "the bank," not by Rebozo. However, the court file shows that the slip confirming the sale, the receipt for the securities, and the check with proceeds of the sale were all marked to the attention of Rebozo.

The money from the sale, $91,574, was credited to Lewis' account at Rebozo's bank. On Dec. 16, Lewis withdrew most of the money from his account, a copy of his bank statement shows.

This was nearly two months after Riley said he told Rebozo the stock was stolen.

Lewis said he gave $120,000 of the total cash he received from the loan to representatives of the fictitious Sturgeon. He said he used the rest in business ventures.

None of the money was recovered, and the insurance company reimbursed Hutton for its loss in December.

In May, 1970, the insurance company sued the bank in an attempt to recover the money. The bank later sued Hutton and Lewis, and Hutton sued the bank. These separate actions are all part of the same case.

The insurance company's complaint, 1½ pages long, said only that the bank had illegally converted the stock to its own use when it changed the name on the stock certificates to Lewis'. The complaint, and the legal case, did not deal with Rebozo's subsequent sale of the stock after Riley said he told Rebozo it was stolen.

U.S. District Court Judge James L. King who was appointed by President Nixon in 1970, ruled in favor of the bank last year. The actions by Key Biscayne Bank against Lewis and Hutton were withdrawn.

"We tried the case on a narrow legal issue, conversion," John R. Hoehl, the Miami lawyer who presented the case for the insurance company, said in an interview. Conversion is an act that deprives someone of his property.

"It backfired on us," Hoehl said. "We felt we didn't have to show what they should have done" to determine whether the stock was owned by Lewis.

A transcript of the one-day trial Jan. 24, 1972, shows Judge King shut off discussion of procedures normally used by banks to determine if street name stock is owned by a loan applicant. He compared such testimony to a witness giving an opinion in a car accident case on who was negligent.

Judge King said this was up to the [sic]

In 1963 and 1964, Judge King, then a Miami lawyer, was a director of Miami National Bank when it was indebted through a mortgage to the Teamsters Union pension fund.

Judge King's fellow directors included Lou Poller, later named as un-indicted coconspirator with Meyer Lansky for allegedly skimming profits from a Las Vegas hotel; Alan M. Kornbluh, who has acted as trustee on a teamster mortgage and is Poller's son-in-law; and Arthur A. Desser, a friend of former Teamster President James R. Hoffa.

Judge King said he was not aware of the Teamster mortgage at the time he was a Miami National Bank director. "If I had known of any Teamster involvement, I would not have served," he said.

The Key Biscayne Bank case was appealed June 7, 1972, to the Fifth Circuit Court of Appeals in New Orleans. The Appeals Court recently sent the case back to Judge King for a more explicit, written opinion.

The stolen stock, according to the original criminal indictment, had been given to Lewis' lawyer, Martin

Fox of New York, by mobsters Joseph (Joe Black) Lamattina and Daniel Mondavano.

They obtained the stock from Jacob (Jake the Mace) Maislich, the indictment said. Maislich pleaded guilty in another stolen securities case involving Anthony (Fat Tony) Salerno and Gilbert (Gil the Brain) Beckley.

. . .

Opposition

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ALEXANDER L. STEVA

No. 81-422

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CHARLES G. REBOZO,
Cross-Petitioner,
v.
THE WASHINGTON POST COMPANY,
Cross-Respondent.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Contrary to the uniform holdings of this Court and the lower courts, must the question whether a libel plaintiff is a public figure be submitted to a jury?

2. Did the court of appeals err in holding that Charles G. ("Bebe") Rebozo is a public figure?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-422

CHARLES G. REBOZO,
Respondent/Cross-Petitioner,

v.

THE WASHINGTON POST COMPANY,
Petitioner/Cross-Respondent.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

Cross-Respondent's statement of the case is contained in the Petition for Certiorari in *The Washington Post Company* v. *Rebozo*, No. 81-173.[1]

REASONS FOR DENYING THE WRIT

I. This Court And The Lower Courts Have Uniformly Treated The Public Figure Issue As One Properly Decided By The Court

Rebozo's main legal argument in support of his cross-petition is that it is generally for the jury to decide whether a libel plaintiff is a public figure. That contention is flatly at odds with the consistent decisions of this Court and the courts of appeals in every circuit.

[1] The Petition for Certiorari in that case also contains The Washington Post Company's Rule 28.1 Listing.

Beginning with its landmark decision in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), in which the Court announced the "actual malice" standard that now governs libel actions by public officials and public figures, this Court has consistently treated the threshold question of the standard's applicability as one for the court to decide. In *New York Times* the Court identified the protection afforded by the "actual malice" standard as "a privilege," the availability of which determines the proper jury instructions on the question of liability. *Id.* at 283 and n.24. There was no suggestion that the availability of the "privilege" was itself a question for the jury to decide. Indeed, two years later, in *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966), the Court expressly stated:

> "as is the case with questions of privilege generally, it is for the trial judge in the first instance to determine whether the proofs show [the plaintiff] to be a 'public official.'" *Id.* at 88.

"Such a course," the Court explained, "will both lessen the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers, and assure an appellate court the record and findings required for review of constitutional decisions." *Id.* at 88 n. 15.

Since *Rosenblatt*, the Court has consistently adhered to the view that the court should decide the threshold question that determines the applicability of the *New York Times* privilege—whether the plaintiff is a public official or a public figure. See, *e.g.*, *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 154-55, 162-65, 172 (1967); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 351-52 (1974); *Time, Inc.* v. *Firestone*, 427 U.S. 448, 453-55 (1976); *Hutchinson* v. *Proxmire*, 443 U.S. 111, 133-36 (1979); *Wolston* v. *Reader's Digest Association*, 443 U.S. 157, 161-63 (1979). It was in *Butts* and its companion case, *Associated Press* v. *Walker*, that the Court first extended the protection of *New York Times* to cases involving public figures. The public figure issue had obviously not

been addressed by the courts below, and this Court proceeded to decide the issue in the first instance, in each case holding that the plaintiff was a public figure. Subsequently, in *Gertz*, *Firestone*, *Hutchinson* and *Wolston*, the Court resolved the public figure issue itself, notwithstanding the fact that remand was required for new trials on other issues. In none of these cases did the Court make the slightest suggestion that the question whether the plaintiff is a public figure is one for the jury to decide.[2]

The district courts and courts of appeals have never waivered from the view that the public figure issue is appropriately resolved by the court. Four circuits have expressly addressed the question, and held the issue to be one for the court to decide. *Waldbaum* v. *Fairchild Publications, Inc.*, 627 F.2d 1287, 1293 & n.12 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980); *Brewer* v. *Memphis Pub. Co.*, 626 F.2d 1238, 1247-48 (5th Cir. 1980), *cert. denied*, 101 S.Ct. 3112 (1981); *Meiners* v. *Moriarity*, 563 F.2d 343, 351 (7th Cir. 1977); *Meeropol* v. *Nizer*, 560 F.2d 1061, 1066 n.6 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978). And courts in every other federal circuit uniformly have treated the public figure issue as a question of privilege to be decided by the court. *Lawrence* v. *Moss*, 639 F.2d 634 (10th Cir.), *cert. denied*, 101 S.Ct. 3021 (1981); *Henderson* v. *Kaulitz*, No. 79-1252, 6 Med. L. Rptr. 2409 (6th Cir., Jan. 6, 1981); *Bruno & Stillman, Inc.* v. *Globe Newspaper Co.*, 633 F.2d

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[2] Similarly, whether the plaintiff is a public official is an issue that has always been resolved by the court. See, *e.g.*, *Time, Inc.* v. *Pape*, 401 U.S. 279, 284 (1971); *St. Amant* v. *Thompson*, 390 U.S. 727, 730 and n.2 (1968); *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81 (1967). The Court has also treated the related question whether an allegedly defamatory statement is related to a public official's official conduct as a question for the court to decide. See *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265 (1971); *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295, 300 (1971).

583 (1st Cir. 1980); *Arctic Co.* v. *Loudoun Times Mirror*, 624 F.2d 518 (4th Cir. 1980), *cert. denied*, 101 S.Ct. 897 (1981); *Steaks Unlimited, Inc.* v. *Deaner*, 623 F.2d 264 (3d Cir. 1980); *Arnheiter* v. *Random House, Inc.*, 578 F.2d 804 (9th Cir. 1978), *cert. denied*, 444 U.S. 931 (1979); *McQuoid* v. *Springfield Newspapers, Inc.*, 502 F. Supp. 1050 (W.D. Mo. 1980).[3]

Contrary to Rebozo's contention, this long line of cases committing the public figure issue to the court does not conflict with the right to a jury trial preserved by the Seventh Amendment. The Seventh Amendment does not mandate a jury determination of every issue in an action at law. This Court has recognized that even in actions at law the court must decide certain preliminary questions that may involve factual issues. See *e.g.*, *Gila Valley Globe & Northern Ry. Co.* v. *Hall*, 232 U.S. 94, 104 (1914) (admissibility of evidence); *Hoyt* v. *Russell*,

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[3] Rebozo suggests that four states have adopted the rule he urges upon the Court. Cross-Petition at 13-14 n.3. In *Madison* v. *Yunker*, 589 P.2d 126, 133 (Mont. 1978) and *Baer* v. *Rosenblatt*, 108 N.H. 368, 237 A.2d 130, 132-33 (1967), the Supreme Courts of Montana and New Hampshire decided that the public figure question should be decided by the jury. In each instance, however, the court based its ruling on provisions of the state constitution, which required that the jury decide all issues of fact *and* of law in those cases tried to a jury. Neither court found support for its ruling in federal law.

The other state cases cited by Rebozo have even less relevance to the issue raised. In *Foster* v. *Laredo Newspapers, Inc.*, 541 S.W.2d 809 (Tex. 1976), the Texas Supreme Court did not cede the public figure issue to the jury, but instead instructed the jury to consider whether the alleged libel concerned the plaintiff's official conduct, an issue "relating to," but hardly identical with, "the existence of the privilege." 541 S.W.2d at 815-16 & n.10. This Court, in any event, has treated the question considered in *Foster* as a court issue. See note 2, *supra*. In *Cahill* v. *Hawaiian Paradise Park Corp.*, 56 Hawaii 522, 543 P.2d 1356 (1975), the Hawaii Supreme Court found only that the application of the privilege in that case could not be decided without further development of the trial record. No suggestion was made that the jury would then decide whether the privilege applied.

117 U.S. 401 (1886) (choice of law). One "preliminary question" that is expressly reserved for the court by the Federal Rules of Evidence is "the existence of a privilege." Fed. R. Evid. 104(a). See also *Ranger, Inc.* v. *Equitable Life Assur. Soc'y.*, 196 F.2d 968 (6th Cir. 1952). This Court has repeatedly identified the public figure issue as a question of "privilege," *New York Times*, 376 U.S. at 283; *Rosenblatt* v. *Baer*, 383 U.S. at 88; *Gertz*, 418 U.S. at 334-35, and as such it is an issue properly decided by the court.[4] The uniform practice of the federal courts in administering the *New York Times* privilege is fully consistent with the Seventh Amendment.

II. The Determination That Bebe Rebozo Is A Public Figure Does Not Warrant Further Review

In holding that Charles G. ("Bebe") Rebozo is a public figure, both the district court and the court of appeals correctly applied the standards announced by this Court in *Gertz* and subsequently applied in *Firestone*, *Hutchinson* and *Wolston*. The district court's and court of appeals' determinations that Rebozo is a public figure are supported by overwhelming undisputed evidence, and those determinations do not warrant further review by this Court.

The undisputed facts establishing Rebozo's public figure status are set forth in the Appendix to this Brief in Opposition and will not be repeated here. They may be summarized briefly as follows.

Rebozo was President Nixon's closest friend while Nixon was in the White House. He maintained a "con-

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[4] Because the public figure issue determines the "constitutionally required [jury] instructions" on liability, *Curtis Publishing Co.* v. *Butts*, 388 U.S. at 174 (opinion of Brennan, J.), it is also analogous to a choice-of-law issue. As with questions of privilege, "[i]t has long been recognized that existential 'facts' must often be decided by the court in order to decide which of alternative laws governs in a particular case." *Chance* v. *E. I. DuPont DeNemours & Co.*, 57 F.R.D. 165, 169 (E.D.N.Y. 1972); *see Hoyt* v. *Russell*, *supra*. Among other things, this practice avoids jury confusion. See *Chance* v. *DuPont*, *supra*.

stant and close relationship" with the President, and did not hesitate to offer his opinions to the President on issues ranging from the Cuban situation to Watergate. He also transmitted to the President the policy suggestions of other important people. A. 7a-9a, 16a-18a.

Rebozo played a major role in President Nixon's financial affairs. For example, the President designated Rebozo to act as his agent in the management of his bank accounts at the Key Biscayne Bank and in the purchase and improvement of the President's two homes in Key Biscayne. And together with Robert Abplanalp, Rebozo facilitated President Nixon's purchase of his San Clemente residence by purchasing 20 of the 26 acres on which the residence was located. A. 9a-10a.

Rebozo played an active role in President Nixon's 1972 election campaign. He helped arrange major contributions from wealthy and powerful men, and he personally accepted substantial contributions to the campaign with full knowledge that contributors gave to him because they believed that their contributions were more likely to come to the President's attention that way. A. 20a-21a. Rebozo maintained an account for the Committee for the Re-Election of the President at the Key Biscayne Bank. And he personally handled large, unreported cash contributions that were stored in a safe deposit box at the Bank—the most controversial of which was a $100,000 cash contribution from Howard Hughes that became known to the Senate Watergate Committee and was reported by the national news media two and a half weeks before the Post article in this case was published. A. 13a-15a, 21a-22a.

Rebozo's activities on behalf of President Nixon and the Nixon Administration occupied the attention of several official investigative bodies. The Senate Select Committee on Presidential Campaign Activities, the so-called Watergate Committee, conducted an extensive investigation into Rebozo's involvement in the 1972 cam-

paign and in the President's personal financial affairs. The Committee eventually published five volumes of evidence on Rebozo's connections with the President and his campaign, and a 140-page report that summarized its findings.[5] A. 5a-6a.

Beginning in April 1973, the Internal Revenue Service conducted an investigation into the $100,000 Hughes contribution received by Rebozo. The IRS investigation was a matter of concern to the White House staff and was treated as a sensitive matter by the IRS because of Rebozo's relationship to the President. A. 6a, 24a-28a. In October 1973 the Watergate Special Prosecution Force began an extensive investigation into the Hughes-Rebozo contribution and related matters, and the contribution was also a subject of the Impeachment Inquiry conducted by the House Judiciary Committee. A. 6a.

Finally, Representative Wright Patman, Chairman of the House Committee on Banking and Currency, investigated allegations concerning Rebozo's business dealings on at least two occasions. The second of these investigations, undertaken shortly before publication of the Post story, focused upon an allegation that Rebozo had used his influence with the President to establish a monopolistic position in Key Biscayne. A. 6a, 29a-30a.

Not surprisingly, Rebozo's activities attracted extensive public attention. In the six months prior to October 25, 1973, the date of the Post article, the New York Times published 48 articles mentioning Rebozo, and the Miami Herald 76. During the month of October 1973, when the Post article was published, the New York Times published 25 articles mentioning Mr. Rebozo, and the Miami Herald 42. A. 1a-2a.

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[5] Presidential Campaign Activities of 1972, Executive Session Hearings Before the Select Committee on Presidential Campaign Activities, 93d Cong., 1st Sess., Books 20, 22, 23, 24, 26 (1974); S. Rep. No. 93-981, 93d Cong., 2d Sess. 931 (1974).

This extensive public attention was, as Rebozo well knew, a predictable consequence of his relationship with the President and his involvement in matters of concern to the public. As Rebozo himself put it, "when you are traveling in the circles that I have traveled in, there are press people all over the place." A. 3a.

Press coverage of Rebozo was not limited strictly to his relationship to President Nixon, the Administration, and the 1972 campaign; it extended to Rebozo's own business and financial affairs as well. As early as December 23, 1968, for example, the New York Times published a feature story on Rebozo that discussed Rebozo's financial and business affairs. And in October 1971 Newsday, a Long Island, New York newspaper, published a six-part series on Rebozo's investments and activities. The third report in the series was entitled "A Story of Stolen Stock and Bebe Rebozo's Bank," and examined the IBM stock transaction that is the subject of the Post article in this case.[6] On October 20, 1973, five days before the Post article was published, the Miami Herald published a lengthy report analyzing the lending policies of the Key Biscayne Bank. A. 2a-3a. See also A. 29a-30a.

Recognizing that his own activities make him a public figure at least for some purposes, Rebozo argues that his public figure status does not extend to this case. Rebozo suggests that he is a public figure only with respect to those specific activities that fall within his "zone or sphere of influence" with the President. The suggestion, however, ignores the scope of Rebozo's public activities and the prominence he achieved. The Post submits, and the district court held, that Rebozo is one of the few libel plaintiffs who has "achieve[d] such pervasive fame or notoriety that he becomes a public figure

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[6] White House concern over the Newsday series led to an IRS audit of the main author, once again providing evidence of Rebozo's prominence and influence. A.30a-33a.

for all purposes and in all contexts." *Gertz*, 418 U.S. at 351. His prominence, after all, did not stem from his involvement in one "particular public controvers[y]," but rather from his "position of . . . persuasive power and influence" as confidant, adviser, financial manager and fundraiser for the most powerful man in the free world. *Id.* at 345. Similarly, his easy access to the media was not limited to a particular issue; the public and the press were interested in all phases of Rebozo's life. See *id.* at 344.

Even if Rebozo is not a public figure for all purposes, his public figure status is certainly broad enough to encompass this case, which involves a controversy over his business conduct and integrity. Rebozo's relationship with President Nixon was based, at least in part, on Rebozo's financial skill and influence. And it was Rebozo's involvement in the President's personal and campaign finances that embroiled him in controversy and attracted public attention. It should have come as no surprise to Mr. Rebozo, then, that public and press attention extended to his business affairs as president and owner of the Key Biscayne Bank.[7]

By his actions Rebozo "invite[d] attention and comment" upon any business conduct, especially potentially criminal conduct,[8] that might reflect upon his integrity and bear upon his fitness to serve the President.[9] Cer-

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[7] Indeed, he himself acknowledges that he "has enjoyed nationwide esteem in the business community." A.3a.

[8] Seven persons were convicted of conspiring to steal the stock at issue here, pursuant to an indictment that alleged: "It was part of the same conspiracy that defendant Martin Fox would arrange to have Charles L. Lewis negotiate and secure a loan from the Bank of Key Biscayne, Florida, using as collateral for such loan 900 shares of stolen International Business Machine Corporation stock." *United States* v. *Lamattina, et al.*, No. 70-490 (S.D. Fla., Sept. 25, 1970).

[9] *Cf. Monitor Patriot Co.* v. *Roy*, 401 U.S. 265 (1971); and *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295 (1971), which held

tainly "the communications media [were] entitled to act on the assumption" that he did. And there is no doubt that Rebozo had ready "access to the channels of effective communication" to "counteract false statements" allegedly contained in the Post article. When he decided to respond to the Post story and other reports, he was able promptly to arrange interviews with editors of the Miami Herald and Walter Cronkite of the CBS television network. A. 4a. In short, with respect to the activities involved in the Post story, Rebozo is clearly a public figure under the twofold test announced in *Gertz*.

CONCLUSION

For the foregoing reasons, the Cross-Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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that "a charge of criminal conduct against an official or a candidate, no matter how remote in time or place, is always 'relevant to his fitness for office'" and therefore covered by the actual malice standard. 401 U.S. at 300.

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 73-1728-Civ. SMA

CHARLES G. REBOZO,
Plaintiff,
v.
THE WASHINGTON POST COMPANY,
Defendant.

STATEMENT OF MATERIAL FACTS AS TO WHICH DEFENDANT CONTENDS THERE IS NO GENUINE ISSUE

Pursuant to Rule 10(J) of the General Rules of this Court, defendant The Washington Post Company states that it contends there is no genuine issue as to any of the following material facts:

[Paragraphs 1 through 3 are printed in the Appendix to the Petition for Certiorari at pages 45a-46a.]

II. *PLAINTIFF'S STATUS AS A PUBLIC FIGURE*

A. *The Key Biscayne Bank*

4. Rebozo owns a controlling (majority) interest in the Key Biscayne Bank, serves as its Chairman and President, and operates the Bank on a day-to-day basis. Rebozo Deposition at 29, 74.

5. The Key Biscayne Bank has approximately $29 million in deposits. Rebozo Deposition at 30.

B. *Media Attention and Publicity in General*

6. In the course of discussing this libel suit and other potential libel suits before the Select Committee on

Presidential Campaign Activities (the "Senate Watergate Committee"), Mr. Rebozo stated:

> "Unfortunately, all of this notoriety has made me what they consider a public person, and I have to prove malice was intended, and it's not quite that easy." 21 Hearings 10128.

7. Mr. Rebozo has been the subject of extensive attention by the local and national news media.

8. From 1968 to 1974, for example, the *New York Times* published over 300 articles mentioning Mr. Rebozo. *The Miami Herald* published over 275 articles mentioning Rebozo in the period from 1972 through 1974. During the same period, Mr. Rebozo's name appeared in numerous articles in the two major national news magazines, *Time* and *Newsweek*. (Three volumes of articles from these publications are submitted as Exhibits K, L, and M.)

9. During the month of October 1973, when the *Post* article was published, the *New York Times* published 25 articles mentioning Mr. Rebozo and the *Miami Herald* published 42 articles mentioning him.

10. The extensive press coverage of Mr. Rebozo has included Rebozo's close friendship with President Nixon, his role in accepting campaign contributions on behalf of the President, his involvement in the President's financial affairs, and his own business and financial affairs.

11. As early as December 23, 1968, the *New York Times* published a feature story on Mr. Rebozo, entitled "Nixon's Close Friend: Man Who Is Able to Keep a Secret." The article reported, among other things, that Senator George Smathers felt that a particular federal judge's chances of being appointed to the Supreme Court were enhanced because he was a friend of Mr. Rebozo, and that Rebozo was instrumental in arranging a meet-

ing between Mr. Nixon and President-elect Kennedy in 1960. The article also discussed Rebozo's financial and business affairs. *See New York Times*, December 23, 1968.

12. In October 1971, *Newsday*, a newspaper published in Long Island, New York, published a series of six special reports on the "investments and activities of Charles G. (Bebe) Rebozo and former Sen. George A. Smathers (D-Fla.) and their relationship with President Nixon." *Newsday*, Oct. 6, 1971. The third report in the series, published on October 9, 1971, was a five-page report entitled "A Story of Stolen Stock and Bebe Rebozo's Bank," which examined the loan transaction that is the subject of the *Post* article in this case. The *Newsday* series is attached as Exhibit B.

13. The civil suit that was the subject of the *Post* article was reported in the media. *See, e.g., New York Times*, September 12, 1970.

14. The extensive publicity that Mr. Rebozo and his activities have received is a predictable consequence of his relationship to President Nixon and others in positions of political power and influence. Mr. Rebozo testified:

> "[W]hen you are traveling in the circles that I have traveled in, there are press people all over the place." Rebozo Deposition at 61.

15. Mr. Rebozo's role as President and majority owner of the Key Biscayne Bank has resulted in a certain amount of publicity. Mr. Rebozo testified that:

> "when you have the only bank in the community, you have to be some of the local news." Rebozo Deposition at 66.

16. Mr. Rebozo has "enjoyed nation-wide esteem in the business community." Complaint ¶ 3.

17. Rebozo has been involved in a number of civic organizations in the Miami area—Kiwanis, the Masons, Boys Club, and Junior Achievement. These activities have attracted a certain amount of publicity. Rebozo Deposition at 17-18.

18. Mr. Rebozo has had no difficulty achieving access to the media when he desired it. In October 1973, he granted an interview to several reporters and editors of the *Miami Herald*. *See Miami Herald*, Nov. 1, 1973. In December 1973, he gave an interview to Walter Cronkite on the CBS television network. Rebozo Deposition at 40, 44.

19. Because of the publicity and notoriety that came to be associated with the name "Bebe" Rebozo, Rebozo used the name Charles Gregory (his first and middle names) in ordering magazine subscriptions, buying things out of catalogs, and making other purchases. 21 Hearings 10051-52 (Testimony of Rebozo); Rebozo Deposition at 9-10.

20. Because of the publicity associated with Rebozo's name, his bookkeeper, Ms. Nicole Moncourt, sometimes ordered items of personal property for Rebozo in her name. 22 Hearings 10489-90 (Testimony of Moncourt); Rebozo Deposition at 12-13.

21. Rebozo has purchased stocks and bonds in the name of his sister, Mrs. Anita Reynolds, because, in his words,

> "I didn't want someone who might see that I was buying [stock] to draw the conclusion that since I was a good friend of the President, that I had some inside information." Rebozo Deposition at 13.

22. Rebozo sold his interest in the B & C Investment Company and other investments because of the publicity attendant to his activities. 21 Hearings 10136 (Testimony of Rebozo); Rebozo Deposition at 36.

23. Tourists continue to be interested in Rebozo's and former President Nixon's houses on Key Biscayne. Rebozo testified as follows:

> "I to this day can't spend the weekend in my home. It is like a zoo. People still come by boat and by car and stop and take pictures." Rebozo Deposition at 174.

C. *Government Investigations of Rebozo*

24. Mr. Rebozo has been the subject of a number of investigations by government bodies.

25. The Select Committee on Presidential Campaign Activities (the "Senate Watergate Committee"), which was established on February 7, 1973 "to investigate illegal or improper campaign activities in the Presidential election of 1972," conducted an investigation into the "receipt, storage, concealment and expenditure of cash contributions by Charles G. Rebozo and related matters." *See* S. Res. 60, 93d Cong., 2d Sess. (1973); S. Rep. No. 93-981, 93d Cong., 2d Sess. 931 (1974) (hereafter "Senate Report"). See Exhibit N.

26. In the course of investigating Rebozo's receipt of cash contributions and related matters, the Senate Watergate Committee interviewed 294 witnesses and took sworn testimony from 25 witnesses. At the conclusion of its investigation, the Committee published a 148-page report, entitled "The Hughes-Rebozo Investigation and Related Matters," which summarized its findings. *See* Senate Report at 1075-78; Presidential Campaign Activities of 1972, Executive Session Hearings on Watergate and Related Activities, Books 20-24, 26, 93d Cong., 2d Sess. (1974) (hereafter "Hearings"). See Exhibit N.

27. Mr. Rebozo testified for two full days in executive session before the Senate Watergate Committee. He had asked to testify at a public hearing. At the conclusion of the second day of executive session testimony,

Mr. Rebozo gave an interview to representatives of the news media. 21 Hearings 9938-10143; Rebozo Deposition at 40-41, 56-59. *See New York Times*, Jan. 31, 1974.

28. As part of a broad investigation of the Howard Hughes organization, the Internal Revenue Service conducted an investigation into the $100,000 Hughes contribution received by Rebozo. See ¶¶ 113-125, *infra*. *See generally* Senate Report at 1001-04, 1016-30.

29. Beginning in October 1973, the Watergate Special Prosecution Force conducted an investigation into the Hughes-Rebozo contribution and related matters. The Special Prosecutor's Office pursued three broad categories of inquiry with the grand jury: possible bribery and campaign contribution violations, income tax violations, and perjury or false statements arising from prior testimony. In addition to reviewing the evidence obtained by the Senate Watergate Committee and the IRS, the Special Prosecutor's office issued nearly 200 subpoenas, called 28 witnesses before the grand jury, and (together with special IRS agents) questioned 123 persons. Report, Watergate Special Prosecution Force 82-84 (October 1975) (Exhibit C).

30. The House Judiciary Committee conducted an investigation to the Hughes-Rebozo contribution as part of its impeachment investigation. Impeachment Inquiry, Hearings Before the House Committee on the Judiciary (Book I), 93d Cong., 2d Sess. 367 (1974) (Exhibit D).

31. Representative Wright Patman, Chairman of the House Committee on Banking and Currency, has investigated allegations concerning Mr. Rebozo's business dealings on at least two occasions. *See* ¶¶ 130, 131, *infra*.

32. In 1973 and 1974, Richard E. Gerstein, Florida State Attorney, conducted an investigation into the question whether money "skimmed" from gambling casinos in the Bahamas was channeled through the Key Biscayne

Bank into the 1972 Republican Presidential Campaign. *See, e.g., New York Times*, Jan. 21, 1974. *See also Miami Herald*, Oct. 6, 1973.

D. *Relationship with President Nixon and Other Public Officials*

33. Mr. Rebozo was President Nixon's closest friend when he was in the White House. They have been friends since 1950, when they were introduced by Richard Danner. Rebozo Deposition at 110, 123.

34. Mr. Rebozo's counsel has expressed the relationship between Rebozo and President Nixon in the following words, which Mr. Rebozo has expressly approved:

> ". . . the relationship between the President and Mr. Rebozo is a friendly, informal one and not one of appointments . . . . [Rebozo's] like an electric light. When the President pulls a switch, turns him on, he'll talk about something now. But it's an informal thing. It might seem strange to someone that you don't go and have an appointment and tell him that. They are in constant and close relationship." 21 Hearings 10063; Rebozo Deposition at 150-51.

35. In addition to his friendship with President Nixon, Mr. Rebozo has been a close friend of President Johnson, Senator Stuart Symington, Senator Russell Long, Senator Spessard Holland, and Senator George Smathers. 21 Hearings 10127 (Testimony of Rebozo).

36. Mr. Rebozo is a boyhood friend of George Smathers. Rebozo assisted Smathers in his 1946 campaign for the House of Representatives and his 1950 and 1956 campaigns for the Senate. Rebozo's assistance took the form of endorsing Smathers to Rebozo's friends and performing minor campaign tasks. Senate Report at 934; Rebozo Deposition at 109-12.

37. Mr. Rebozo was with Richard Nixon in Nixon's hotel suite when the 1960 election results were coming in. Rebozo Deposition at 249.

38. Mr. Rebozo was a frequent visitor to the White House during the Nixon Administration. When he was in Washington, he usually stayed at the White House. Often he would visit the First Family for a weekend at Camp David, and when he did so he would go to Camp David by government helicopter or car. Rebozo Deposition at 141-42.

39. From time to time, President Nixon would convey to Rebozo the impression that he wanted Rebozo's opinion on a subject. When Rebozo felt that the President wanted his opinion, he offered it. Rebozo Deposition at 48-49.

40. On April 15, 1973, for example, Rebozo had dinner with President Nixon aboard the Presidential yacht Sequoia. The President told Rebozo that Haldeman and Ehrlichman may have been involved in the Watergate scandal. Rebozo responded that if he were a White House official accused of wrongdoing in connection with Watergate, he would tender his resignation pending the resolution of the charges. Rebozo Deposition at 49, 145, 155-56.

41. During the Watergate controversy, Mr. Rebozo received dozens of letters a month about President Nixon and Watergate. Rebozo Deposition at 151-52.

42. At Rebozo's invitation, Richard Danner met on May 20, 1973 with Rebozo and President Nixon at Camp David to discuss the political feelings on the west coast concernnig Watergate. 21 Hearings 10101-02, 10110 (Testimony of Rebozo); Senate Report at 1010-12.

43. Mr. Rebozo counseled with President Nixon about his decision to resign the Presidency during the preceding week. Mr. Rebozo read the transcript of the June 23rd White House tape, the so-called "smoking gun," and advised the President that in his view the tape was no basis for resigning. Rebozo Deposition at 153-54.

44. Mr. Rebozo joined former President Nixon in San Clemente the day after Nixon resigned the Presidency. *See New York Times*, Aug. 11, 1974; *Miami Herald*, Aug. 12, 1974.

45. After the resignation of former President Nixon, Rebozo and several others attempted to preserve Nixon's homes on Key Biscayne as an historical landmark. Rebozo Deposition at 173-74, 176-77.

46. Mr. Rebozo has discussed with President Nixon the attitude of the Cuban community in Florida toward Fidel Castro. Rebozo Deposition at 172-73.

47. In February 1974, the *Miami Herald* reported that Cyrus S. Eaton, after returning from a visit to Cuba, had expressed the view that Rebozo's influence upon President Nixon was a major roadblock to the normalization of relations with Cuba. *Miami Herald*, Feb. 19, 1974. See also *New York Times*, July 18, 1974.

48. Because Donald Nixon's relationship to associates of Howard Hughes was a matter of potential embarrassment to the Nixon Administration, Rebozo attempted to keep Donald Nixon away from Hughes' associates. Rebozo Deposition at 156; 20 Hearings 9599 (Testimony of Danner).

E. *Role in President Nixon's Financial Affairs*

49. While Richard Nixon was President, Mr. Rebozo played a significant role in the President's financial affairs, and the Senate Watergate Committee inquired into that role as part of its investigation. See ¶¶ 50-66, *infra*.

50. When Richard Nixon became President, he designated Rebozo to act on his behalf in the purchase of two houses in Key Biscayne, Florida, and in the management of his bank accounts at the Key Biscayne Bank. Rebozo Deposition at 122, 136-37.

51. In December 1968, President-elect Nixon purchased two homes in Key Biscayne, Florida. The down payment for these homes came from the proceeds of a $65,000 loan from the First National Bank of Miami, for which Mr. Rebozo executed the promissory note. President Nixon repaid the loan in full in September 1969. Senate Report at 1048-49.

52. Mr. Rebozo facilitated President Nixon's purchase in July 1969 of his San Clemente residence. The residence that the President purchased was on a parcel of approximately 26 acres. The parcel was divided, with the President purchasing approximately 6 acres of land, and Rebozo and Robert Abplanalp purchasing the remainder. Rebozo Deposition at 262.

53. Mr. Rebozo's role in the purchase of the San Clemente property was first made public by the White House on August 27, 1973. *See New York Times*, August 28, 1973.

54. Mr. Rebozo assisted President Nixon in the purchase and sale of the President's interest in the Fisher Island Company, a company of which Rebozo was president. 21 Hearings 10131 (Testimony of Rebozo); Rebozo Deposition at 262-63.

55. Mr. Rebozo assisted President Nixon in the disposal of one or two parcels of land in Florida. Rebozo Deposition at 265.

56. In 1972 Mr. Rebozo purchased a house in Maryland for the use of David and Julie Eisenhower. President Nixon had made an initial deposit on the house, but Rebozo then told the President that he would buy the house and rent it to David and Julie Eisenhower. Rebozo Deposition at 261-62; 21 Hearings 10132 (Testimony of Rebozo).

57. Mr. Rebozo paid for the installation of a bowling alley in the White House. Rebozo Deposition at 265-66.

58. The Senate Watergate Committee reported that Rebozo used $4,500 in leftover campaign funds to purchase platinum diamond earrings for Mrs. Nixon. Senate Report at 1047-48.

59. An August 20, 1973 report on President Nixon's assets and liabilities reflected expenditures of $76,000 from the President's personal account at Key Biscayne Bank for improvements and furnishings at his properties in Key Biscayne, Florida. Senate Report at 1032-33.

60. In addition to the $76,000 in expenditures from the President's personal account, Mr. Rebozo controlled approximately $45,000 in expenditures for improvements and furnishings at the President's Key Biscayne properties. Senate Report at 1031, 1034.

61. The evidence before the Senate Watergate Committee indicated that the $45,000 in expenditures were paid from the following sources:

a. Personal checks of Mr. Rebozo	$13,361.21
b. Checks from trust accounts	23,213.01
c. Currency	5,065.28
d. Unknown—believed to be currency ..	3,981.65
	$45,621.15

The evidence also indicated that at least $23,500 in cash was deposited in the trust accounts in $100 bills. Senate Report at 1034, 1042; Interview of Thomas H. Wakefield, June 24, 1974.

62. According to Mr. Rebozo's testimony, the funds deposited in the trust accounts were President Nixon's funds, and President Nixon usually reimbursed him for any expenditures he made on the President's behalf. Rebozo Deposition at 285; 21 Hearings 10078.

63. The Watergate Committee was unable to reach a conclusion as to the ultimate source for the $45,000 in expenditures on President Nixon's Key Biscayne prop-

erties. The Committee concluded only that the evidence suggested one of three conclusions: (1) Rebozo paid for the expenditures out of his own funds; (2) the President in effect paid for the expenditures by later reimbursing Rebozo; or (3) Rebozo paid for the expenditures on the President's behalf from campaign contributions.. Senate Report at 1070-71.

64. The Watergate Committee stated that it was precluded from reaching any conclusion as to the ultimate source for these expenditures by Mr. Rebozo's refusal to produce subpoenaed documents relating to the expenditures. Senate Report at 1070-71. *See also* Senate Report at 913, 1031, 1039, 1045, 1046, 1047, 1049, 1052; 26 Hearings 12585-639 (Exhibits 55, 56).[1]

65. The Senate Watergate Committee, at the conclusion of its investigation, recommended that "State and local bar associations should conduct a study of the attorney-client privilege in light of the abuses of the privilege uncovered during the Select Committee's investigations." The Committee noted that the privilege had been pleaded for conversations between Rebozo and both Kalmbach and Wakefield "as part of an attempt to cover up illegal or questionable activities that had nothing to do with the rendering of legal advice." Senate Report at 1074.

66. Based on the evidence it received relating to expenditures by Mr. Rebozo on behalf of President Nixon, the Senate Watergate Committee made the following legislative recommendation:

> "Congress should enact legislation requiring full financial disclosure by the President and Vice President of the United States to the General Accounting

[1] Numbered exhibits refer to Senate exhibits contained in the designated volume of hearings.

Office each year of all income, gifts, and things of value that they or their spouses have received during the year or expenditures made for their personal benefit or the benefit of their spouses by other individuals." Senate Report at 1073.

F. *The $1,000 Hughes-Rebozo Contribution and the Hughes-O'Brien Inquiry*

1. *The Contribution*

67. In the summer of 1970, Rebozo accepted a $100,000 cash contribution from Howard Hughes for President Nixon's 1972 reelection campaign. The $100,000 consisted of 1,000 hundred dollar bills, and was delivered personally to Rebozo in two installments. 21 Hearings 9955, 9960-63, 9984; Senate Report at 954-56; Deposition of Charles G. Rebozo, *Common Cause* v. *Finance Committee to Re-Elect The President*, pp. 16, 29 (hereafter "Common Cause Deposition") (Exhibit E).

68. During the 1968 Presidential campaign, Rebozo was asked by representatives of Howard Hughes whether he would accept a $50,000 contribution to the Presidential campaign of Richard Nixon. Rebozo declined to accept the contribution because he recalled the embarrassment that was caused by a loan to Nixon's brother in 1958 and believed that a Hughes contribution to the campaign would prove to be another embarrassment. 21 Hearings 9942-43, 9955; Senate Report at 936; Common Cause Deposition 18-20.

69. Mr. Rebozo's role in accepting the $100,000 Hughes contribution became known to the Senate Watergate Committee and was reported by the national news media during the week of October 8, 1973. *See, e.g., New York Times*, Oct. 10, 11, 13, 14, 1973.

70. Rebozo's acceptance and handling of the $100,000 Hughes contribution was the subject of intensive investi-

gation by the Senate Watergate Committee. *See generally* Senate Report at 931-1078.

71. The Watergate Committee concluded that

> "[t]he transmittal of $100,000 in $100 bills from Howard Hughes to President Nixon's close friend, Charles G. Rebozo, several years prior to the 1972 election, reflects a number of classic issues inherent in the furnishing of large cash contributions to political campaigns:
>
> 1. Why were cash funds furnished to a close friend of the President rather than to any campaign official or organization?
>
> 2. Why were the funds contributed several years prior to the 1972 campaign for which they were allegedly intended, especially since Howard Hughes ultimately contributed another $150,000 in 1972 to the Finance Committee To Re-Elect the President?
>
> 3. Did Howard Hughes profit in any way by his contribution to Rebozo on behalf of the President?" Senate Report at 1068.

72. Although Rebozo accepted the $100,000 from Hughes for use in the President's 1972 reelection campaign, the money was not used in the campaign. After he received the $100,000 Hughes contribution, Rebozo placed it in a safe deposit box in the Key Biscayne Bank; he never forwarded the money to any campaign official. Common Cause Deposition at 25-28, 32; Senate Report at 968-72.

73. Rebozo did not inform any campaign official of the $100,000 Hughes contribution until after the 1972 election. Rosemary Woods, President Nixon's secretary was the only person Rebozo told about the $100,000 contribution before the 1972 election. Common Cause Deposition at 24; 21 Hearings 9978.

74. Rebozo has consistently testified that he never withdrew any of the Hughes money from the safe deposit box until he returned the money to Hughes in 1973. Senate Report at 968-72; Common Cause Deposition at 32. But Herbert W. Kalmbach, former personal attorney of President Nixon, testified before the Committee that Rebozo had told him in April 1973 that part of the $100,000 had been disbursed to Rosemary Woods, Donald Nixon, Edward Nixon, and unnamed others. 21 Hearings 10189. *See* Senate Report at 1004-09.

75. Rebozo discussed the $100,000 Hughes contribution with President Nixon on two occasions, according to his testimony. Sometime after the 1972 election, Rebozo told the President about the contribution; and in March or April 1973 Rebozo told the President that he had decided to return the Hughes contribution, a decision with which the President agreed. 21 Hearings 10090, 9994, 10101; Senate Report at 1004.

76. In an October 26, 1973 press conference, President Nixon responded to charges that Mr. Rebozo had acted improperly in handling the $100,000 Hughes contribution, and to an ABC television news report that the Special Prosecutor, Archibald Cox, had uncovered evidence of a $1 million trust fund administered by Rebozo on Nixon's behalf. The President described Mr. Rebozo as a "totally honest man." *See, e.g., New York Times*, Oct. 27, 1973.

2. *Potential Use of the Hughes Money for Legal Fees*

77. In late 1972 or early 1973, Mr. Rebozo told President Nixon that it would be "no problem" for him to raise the money necessary to pay the legal fees of those members of the Nixon Administration who were facing criminal charges. Rebozo considered using the Hughes

money ($100,000) and matching that amount from some other source. Rebozo did not think that the Hughes people would mind if the Hughes money were used for legal fees. Rebozo Deposition at 168-70, 226.

78. On April 17 and April 25, 1973, President Nixon offered to provide $200,000 to $300,000 in cash to John Ehrlichman and H.R. Haldeman for their legal defense. The President indicated that Mr. Rebozo could provide the necessary funds. 23 Hearings 11074, 11082 (Testimony of Higby); White House Transcripts, April 17, 25, 1973 (Exhibit F).

3. *The Question of Hughes' Access to the Nixon Administration*

79. There is evidence to indicate that Hughes' contributing money through Rebozo was intended by Hughes to insure access to President Nixon, and that Hughes did in fact have access to the Nixon Administration in several instances. Senate Report at 935; Interviews with Robert Maheu, Sept. 15, 1973 and Jan. 20, 1974; see ¶¶ 80-87, *infra.*

80. As part of its investigation of Howard Hughes' contributions to President Nixon's election campaign, the Senate Watergate Committee investigated "the relation between campaign contributions by Hughes and Federal actions affecting Hughes"—specifically, the Justice Department's consideration of Hughes' proposed purchase of the Dunes Hotel in Las Vegas. The Committee noted that while a Hughes proposal to buy another Las Vegas hotel had been presented to (and rejected by) the Antitrust Division in 1968, Hughes' case on the purchase of the Dunes was presented in 1970 directly to Attorney General Mitchell in a series of secret meetings with Richard Danner, the man who delivered the Hughes contribution to Rebozo. Mitchell's approval of the Dunes purchase, the Committee concluded, was "clothed with the

appearance of impropriety" and constituted "a classic case of governmental decision-making for friends." Senate Report at 981, 998.

81. Mr. Rebozo testified that when he received a substantive letter from a responsible person, such as Richard Danner or Howard Hughes, he would attach one of his cards to the letter and forward it to the appropriate person in the Nixon Administration. Rebozo Deposition at 207-08.

82. On March 3, 1970, Richard G. Danner sent Mr. Rebozo a letter discussing the subject of school busing and enclosing the views of Ed Morgan, an attorney for Howard Hughes. Mr. Danner stated in this letter: "It occurred to me that some of your friends up the line might be interested in [Morgan's] comments." 21 Hearings 10162 (Rebozo Exhibit No. 8).

83. On March 17, 1970, Mr. Danner sent Mr. Rebozo a letter and a "To Whom It May Concern" memorandum, expressing Howard Hughes' fears concerning certain underground testing in Nevada by the Atomic Energy Commission. The letter concluded as follows: "If it is possible on your part, I would sincerely appreciate having a scientific explanation as to why these fears of earthquakes or contamination are groundless, or a simple explanation that our national existence is dependent upon our ability to further develop and refine our nuclear capabilities." 21 Hearings 10163 (Rebozo Exhibit No. 9). Mr. Danner testified that he sent this letter and memorandum to Rebozo because "I thought he would be in a position to put them into the hands of the proper people." 20 Hearings 9592.

84. Mr. Rebozo has testified that he "may have, just in passing some time, mentioned [Howard Hughes' concern about underground testing in Nevada] to Mr. Nixon." Rebozo Deposition at 138.

85. Mr. Danner relayed to Mr. Rebozo Howard Hughes' fears concerning the dumping of nerve gas in the Atlantic Ocean. Danner testified that he and another Hughes associate spoke to Rebozo about this subject because they "felt that he could get the word to the proper people, rather than us trying to find someone to talk to here in Washington." 20 Hearings 9596 (Testimony of Danner); Rebozo Deposition at 138-39.

86. Richard Danner testified before the Watergate Committee that he delivered to Mr. Rebozo a memorandum prepared by Howard Hughes on the ABM (anti-ballistic missile), that Rebozo forwarded the memorandum to the appropriate officials, and that Rebozo later told him that both the President and Henry Kissinger had read either the memorandum or a brief of it. In response to this memorandum, Mr. Kissinger offered to brief Howard Hughes on the ABM. Mr. Rebozo's only recollection of the incident is that he did talk to Hughes people about the ABM on one occasion, and that Mr. Kissinger was willing to brief Mr. Hughes. 20 Hearings 9596-97 (Testimony of Danner); 21 Hearings 10045-47 (Testimony of Rebozo); Rebozo Deposition at 139-40.

87. Mr. Danner testified before the Watergate Committee that Rebozo had told him that Administration officials were concerned about the financial condition of TWA, a major airline in which the Hughes Tool Company owned an interest. Rebozo has testified that he may have expressed concern about TWA's financial condition to someone in the Administration. 21 Hearings at 10049 (Testimony of Rebozo); 20 Hearings at 9566 (Testimony of Danner).

4. *The Hughes-O'Brien Inquiry*

88. At the request of H.R. Haldeman, John Dean conducted an inquiry into the relationship between Lawrence O'Brien, Democratic National Committee Chair-

man, and Howard Hughes. In a confidential memorandum, dated January 26, 1971, reporting his preliminary findings to Haldeman, Mr. Dean stated that he had "discussed the matter with Bebe Rebozo." After relating the information provided by Rebozo, Dean stated:

> "[Rebozo] also requested that if any action be taken with regard to Hughes that he be notified because of his familiarity with the delicacy of the relationships as a result of his own dealings with the Hughes people."

23 Hearings 11127 (Higby Exhibit No. 5-D).

89. Rebozo has testified that he does not specifically recall asking to be notified of any action to be taken with regard to Hughes, but that he may have asked Ehrlichman to be notified of any such action. 21 Hearings 10129.

90. Mr. Haldeman responded to Mr. Dean's January 26 memo by a confidential memo dated January 28, 1971, in which he stated that "we should keep . . . Bebe out of it at all costs." 23 Hearings 11130 (Higby Exhibit No. 5-E).

5. *The Hughes-Rebozo Contribution and the Watergate Break-in*

91. One theory that has been advanced publicly as to the motive for the Watergate break-in is that it was intended to discover whatever evidence Democratic National Committee Chairman Lawrence O'Brien may have possessed concerning the Hughes-Rebozo contribution, with the ultimate aim of suppressing that evidence from the public. The Senate Watergate Committee staff prepared an inconclusive report setting forth this theory. *See generally New York Times*, Aug. 4, 1974.

G. *Other Campaign Contributions to Rebozo*

92. During President Nixon's 1968 Presidential campaign, Rebozo controlled an account at the Key Biscayne Bank in the name of the "Florida Nixon for President Committee." Rebozo Deposition at 117-18; Senate Report at 942.

93. Rebozo played a role in the solicitation of major contributions to President Nixon's 1972 campaign, and he accepted approximately $190,000 in contributions on behalf of the President's 1972 campaign. *See* ¶¶ 94-104, *infra.*

94. On February 17, 1969, less than one month after President Nixon's inauguration, H.R. Haldeman wrote a confidential memorandum to John Ehrlichman, which stated:

> "Bebe Rebozo has been asked by the President to contact J. Paul Getty in London regarding major contributions.
>
> Bebe would like advice from you or someone as to how this can legally and technically be handled. The funds should go to some operating entity other than the National Committee so that we retain full control of their use.
>
> Bebe would appreciate your calling him with this advice as soon as possible since the President has asked him to move quickly."

26 Hearings 12469 (Exhibit 15).

95. Rebozo wrote a letter to J. Paul Getty introducing Herbert Kalmbach for the purpose of soliciting a contribution to President Nixon's 1972 reelection campaign. Mr. Getty subsequently contributed $125,000 to the campaign. 21 Hearings 9974-75; Senate Report at 999; Rebozo Deposition at 124, 129.

96. Rebozo arranged an appointment for Herbert Kalmbach with Raymond Guest for the purpose of soliciting a contribution to President Nixon's 1972 reelection campaign. Mr. Guest subsequently contributed $200,000 to the campaign. 21 Hearings 9974-75; Senate Report at 999; Rebozo Deposition at 124, 129.

97. Rebozo accepted approximately $190,000 in contributions to the 1972 Presidential campaign—$100,000 from Howard Hughes, $50,000 from A.D. Davis, and nearly $40,000 that went through an account at the Key Biscayne Bank in the name of the "Committee for the Re-Election of the President." Senate Report at 999 n.57.

98. Contributors to President Nixon's campaign gave their contributions to Mr. Rebozo because they believed that their contributions would be more likely to come to the President's attention that way. Rebozo Deposition at 124.

99. On April 5, 1972, Rebozo opened the "Committee for the Re-Election of the President" account at the Key Biscayne Bank. Rebozo deposited $39,740 in contributions in that account. All of these contributions were eventually transferred to the main account of the Finance Committee to Re-Elect the President in Washington, D.C., Senate Report at 999-1000; Common Cause Deposition at 11, 13, 52, 57; 26 Hearings at 12518-28 (Exhibit 42), 12530 (Exhibit 44), 12531 (Exhibit 45).

100. Rebozo acknowledged each of the contributions that was deposited in the "Committee for the Re-Election of the President" account with a personal note. 26 Hearings 12532-74 (Exhibit 46).

101. On April 4 or 5, 1972, Rebozo received a $50,000 cash contribution from A.D. Davis. Rebozo did not deposit this money in the campaign account at the Key Biscayne Bank, but rather stored the money in a safe

deposit box at the bank. He reported the contribution to the Finance Committee, which sent Fred LaRue down to Miami to pick up the contribution. 21 Hearings 10117; Senate Report at 1000-01; Rebozo Deposition at 126-28, 205-06.

102. Fred LaRue testified before the Watergate Committee that he did not discuss or receive any campaign contributions from Rebozo until October 1972, 6 months after Rebozo received the Davis contribution; that he received about $25,000 in cash from Rebozo in October; that he commingled that cash with cash in his file cabinet that was being used to pay the Watergate defendants; and that sometime in 1972 a courier for the campaign of Senator Nunn picked up a sum of about $25,000 from LaRue. Senate Report at 1000-01; 23 Hearings 11153-54, 11163-64.

103. The Senate Watergate Committee's investigation revealed that the $50,000 contribution from A.D. Davis was not reported in any records of the Finance Committee to Re-Elect the President. Senate Report at 1000.

104. In its Final Report, the Senate Watergate Committee concluded that "[s]everal issues remain unresolved concerning the Davis contribution and related events," including the following:

> "1. Why Mr. Rebozo failed to deposit the Davis contribution in the bank account opened expressly for the purpose of receiving pre-April 7 contributions?
>
> • • • •
>
> 5. Were any funds furnished by Rebozo to La Rue paid to the Watergate defendants, and did Rebozo have any knowledge of that?"

Senate Report at 1001.

H. *The Alleged Fund for "Administration-Connected Costs"*

105. The Watergate Committee concluded that in 1969 "the President, Rebozo, Haldeman, and Ehrlichman sought to establish a fund to be controlled by the White House staff rather than by the Republican National Committee," and that "Rebozo controlled funds during 1969 which he used for 'administration-connected costs.'" Senate Report at 1030.

106. H.R. Haldeman wrote a confidential memorandum to John Ehrlichman, dated February 17, 1969, which discussed Rebozo's request for advice on how to follow through on a request by the President to contact J. Paul Getty "regarding major contributions." The memorandum stated that "[t]he funds should go to some operating entity other than the National Committee so that we retain full control of their use." 26 Hearings 12469 (Exhibit 15).

107. After the 1968 election, in April 1969, Rebozo opened a new account (the "Wakefield special account") with a deposit of $6,000 from the Florida Nixon for President Committee account (see ¶ 92, *supra*). Senate Report at 942; 26 Hearings 12471 (Exhibit 17).

108. On April 28, 1969, Rebozo wrote a letter to Herbert Kalmbach referring to the Wakefield special account. The letter stated in part:

> "Over the weekend, I spoke with John Ehrlichman and explained to him that it had been decided that the larger balance which I mentioned to you will be kept here in order to take care of frequent administration-connected costs which arise from time to time."

26 Hearings 12470 (Exhibit 16).

109. Rebozo testified before the Watergate Committee that the $6,000 deposited in the Wakefield special account was intended to reimburse him for expenses he had incurred in the course of the campaign, but that at Herbert Kalmbach's request he subsequently sent approximately $1,500 to Kalmbach from that account. 21 Hearings 9946-47, 9950 (Testimony of Rebozo).

110. In April 1969 Rebozo sent Herbert Kalmbach $416.18 from the Florida Nixon for President account and the Wakefield special account. These funds were deposited by Kalmbach in an account maintained to pay for expenses incurred by Jack Caulfield for "matters of interest to J.D.E." Senate Report at 942; 23 Hearings 10861-63 (Testimony of Kalmbach); 26 Hearings 12470 (Exhibit 16), 12472 (Exhibit 18).

111. In July 1969 Rebozo sent Kalmbach a $1,000 check from the Wakefield special account, which was subsequently used by Kalmbach to pay the expenses and salary of Anthony T. Ulasewicz. Senate Report at 942; 23 Hearings 10860 (Testimony of Kalmbach).

112. Herbert Kalmbach testified before the Watergate Committee that he told Rebozo that the funds from the Wakefield special account were for Caulfield and Ulasewicz. Rebozo, however, has testified that he did not know the purpose of the funds. 23 Hearings 10860-61 (Testimony of Kalmbach); 21 Hearings 9947-48 (Testimony of Rebozo).

I. *The IRS Investigation of Rebozo*

113. The IRS investigation of Rebozo in connection with the Hughes contribution, ¶ 28, *supra*, was a matter of concern to the White House staff, and was treated as a sensitive matter by the IRS because of Rebozo's relationship to the President. *See* ¶¶ 114-125, *infra*.

114. "Sensitive case reports" were prepared within the Internal Revenue Service on a monthly basis to alert the Commissioner and the Secretary of IRS to investigations that might touch upon prominent persons. Senate Report at 1017; 24 Hearings 11628, 11630 (Testimony of Johnnie M. Walters).

115. Rebozo was mentioned in IRS sensitive case reports in connection with the Hughes contribution and in connection with an allegation that Rebozo may have instructed John H. Meier, who had allegedly received millions of dollars from the fraudulent sales of mining claims to Howard Hughes, to be unavailable for an IRS interview. Senate Report at 1017-18; 24 Hearings at 11627-29, 11659 (Testimony of Walters).

116. In May 1972, Roger Barth, an assistant to the Commissioner of IRS, received a sensitive case report relating to the Hughes investigation. Because the sensitive case report contained allegations of possible wrongdoing by Rebozo and President Nixon's brothers, Barth transmitted a copy of the sensitive case report to John Ehrlichman at the White House. 23 Hearings 11222 (Testimony of Barth); 21 Hearings 9683-85 (Testimony of Ehrlichman); Senate Report at 1002-03, 1025-26.

117. In an effort to avoid involvement in politics, the IRS adopted a policy by early 1972 of postponing politically sensitive matters until after the 1972 election. In keeping with that policy the Commissioner of IRS, Johnnie M. Walters, postponed until after the election a request by IRS field agents to interview Rebozo in the summer of 1972. 24 Hearings 11641, 11643; Senate Report at 1002, 1018.

118. Walters wanted President Nixon and the Secretary of the Treasury, George P. Shultz, to be informed before IRS agents interviewed Rebozo, because Rebozo was "close to the President" and the matter was there-

fore "very sensitive." 24 Hearings 11654 (Testimony of Walters).

119. On February 23, 1973 Johnnie M. Walters, Commissioner of IRS, sent a "sensitive and confidential" memo to George P. Shultz, Secretary of the Treasury, informing him of the need to interview Mr. Rebozo to determine the facts surrounding the Hughes contribution. Walters wrote:

> In the development of the IRS investigation involving the Howard Hughes interests and associates, our field investigative team has concluded that there is a need to interview Mr. Charles "Bebe" Rebozo and Mr. Donald Nixon. I am convinced that it would be advisable to authorize these interviews. However, in view of the sensitivity, I shall not authorize the interviews until you and I have an opportunity to discuss the subject.

This information was sent to John Ehrlichman at the White House. 24 Hearings 11648-50, 11675 (Exhibit 7) (Testimony of Walters); 23 Hearings 11224, 11231 (Testimony of Barth); Senate Report at 1001-02.

120. IRS officials did not contact Rebozo to arrange an interview until both George P. Schultz and John Ehrlichman gave their go-ahead. 24 Hearings 11651 (Testimony of Walters); 21 Hearings 9680, 9684 (Testimony of Ehrlichman); 23 Hearings 11231 (Testimony of Barth).

121. Rebozo was informed that the IRS wanted to interview him by John Ehrlichman. Rebozo Deposition at 253.

122. Because the IRS investigation of the Hughes contribution was "a matter which could be of embarrassment to [President Nixon]," General Alexander Haig briefed the President on the investigation in May 1973. At the President's request, General Haig secured the name of a

tax attorney for Mr. Rebozo and gave the name of that attorney to Mr. Rebozo. Rebozo subsequently retained the attorney to advise him in connection with the investigation. 23 Hearings 10999-11000 (Testimony of Haig); Senate Report at 1013-14.

123. General Alexander Haig discussed the IRS investigation of the Hughes contribution with President Nixon several times. 23 Hearings 11029; Senate Report at 1024-25.

124. According to the Senate Watergate Committee, evidence it received indicated that the IRS investigation of Mr. Rebozo:

"— was postponed several times

— was handled through oral rather than the normal written reports

— included advance notice to the President and Rebozo

— did not inquire into the relevant periods given in testimony and evidence available

— allowed Rebozo's attorney, rather than the IRS, to obtain information from third-party witnesses

— did not include additional interviews with Rebozo even after IRS had learned Rebozo had altered his previous statements

— included notice to Rebozo that the IRS did not intend to pursue any criminal investigation of the matter

— included notice by the IRS to Rebozo and his attorney that the Special Prosecutor's Office had sought and obtained disclosure of evidence regarding Rebozo

— involved use of extra personnel at the request of the taxpayer"

Senate Report at 1016-17.

125. Based on the evidence it received in the course of investigating the Hughes-Rebozo contribution, the Senate Watergate Committee made the following legislative recommendation:

> "Communications between the White House and the Internal Revenue Service should be more strictly regulated. Specifically:
>
> (a) Any requests, direct or indirect, for information or action made to the IRS by anyone in the Executive Office of the President, up to and including the President, should be recorded by the person making the request and by the IRS. Requests and responses by the IRS (i.e. whether information was provided), should be disclosed at least once a year to appropriate congressional oversight committees;
>
> (b) On "sensitive case reports," which cover special cases, the IRS should be permitted to disclose to persons in the Executive Office of the President up to and including the President, *only* the name of the person or group in the report and the general nature of the investigation;
>
> (c) All persons in the Executive Office of the President, up to and including the President should be prohibited from receiving indirectly or directly any income tax return;
>
> (d) All requests for information or action and all IRS responses should be disclosed periodically to the appropriate congressional oversight committees."

Senate Report at 1071.

J. *The Centro Commercial Cubano and Rebozo's Relationship with the Small Business Administration*

126. Rebozo's investment in the Centro Commercial Cubano and his relationship with the Small Business Administration have been the subjects of public attention. *See* ¶¶ 127-30.

127. Mr. Rebozo was a partner in a venture that constructed a shopping center, Centro Commercial Cubano, for Cuban merchants. The Small Business Administration agreed to guarantee the rents for 26 Cuban merchants in the Center. Mr. Rebozo viewed the venture as a worthwhile civic project for the Cuban community. Rebozo Deposition at 33-34, 258-60.

128. The construction of the Centro Commercial Cubano was extensively reported in the media. Rebozo Deposition at 260; New York Times, Jan. 12, 1969.

129. Rebozo discussed with President Lyndon Johnson charges that political pressure had been brought to bear to secure favored treatment by the SBA for the Centro Commercial Cubano. It was because of these charges that Rebozo sold his interest in the Center. Rebozo Deposition at 33-34; 21 Hearings 10082 (Testimony of Rebozo).

130. In 1969 Representative Wright Patman, Chairman of the House Committee on Banking and Currency, questioned whether Rebozo had been a "preferred customer" of the Small Business Administration, referring to an $80,000 small business loan given to Rebozo in 1962. *See* New York Times, Aug. 12, 1969. *See also* Rebozo Deposition at 258.

K. *The Applications for Competing Banks in Key Biscayne*

131. In 1973 the Offices of the Comptroller of the Currency rejected an application to establish a national bank to compete with the Key Biscayne Bank in Key Biscayne.

At approximately the same time, another federal agency granted a charter for a savings and loan association to a group of investors headed by Thomas Wakefield, a director of the Key Biscayne Bank, and assisted by Mr. Rebozo. Representative Wright Patman, Chairman of the House Committee on Banking and Currency, investigated both of these decisions, and the allegation that Rebozo had "used his influence with the President to establish a monopolistic position in Key Biscayne." Rebozo Deposition at 208-12, 215-16; *see, e.g.*, New York Times, Oct. 17, 20, 1973; Miami Herald, Oct. 17, 24, 1973.

L. *The IRS Audit of the Author of the Newsday Series*

132. The *Newsday* reports on Mr. Rebozo (*see* ¶ 12, *supra;* Exhibit B) were a matter of concern to members of the White House staff, both before and after publication. *See generally*, 3 Hearings 1072 (Testimony of John Dean); 22 Hearings 10368-76 (Testimony of John J. Caulfield); 23 Hearings 11098, 11101-02, 11143-44 (Testimony of Lawrence M. Higby); Rebozo Deposition at 30-31.

133. Jack Caulfield testified before the Watergate Committee that prior to its publication "the forthcoming Newsday article was a matter of constant conversation around the White House." 22 Hearings 10373.

134. Jack Caulfield testified that prior to publication of the *Newsday* series John Dean asked him to look into the status of the *Newsday* investigation. On the basis of information provided primarily by an FBI agent in New York, Mr. Caulfield wrote the following memo to Mr. Dean.

> "Memorandum for John W. Dean, III
>
> From: Jack Caulfield
>
> Subject: *Newsday* Article
>
> "New York sources advise the following scattered pieces of information:

A) A discreet look at the newspaper's publication calendar has been accomplished. There is *no indication at this time* that the subject series of articles will appear during the month of September. However, this could be subject to change because of the high priority being given to the article.

B) Unusual and highly secretive steps have been taken to prevent the substance of the article from becoming known to other employees.

C) A trusted member of the newspaper's staff has stated that heavy outside pressure is being exerted to uncover the details of the story before publication. This pressure is *independent* of the efforts being programmed from my office.

D) A firm consensus has been reached that Ed Guthman of the L. A. Times is close to this matter. It is alleged that he was in New York at the time of the planning stages of the inquiry.

E) Robert Greene, leader of the investigative group, has been in both Washington and Florida within the past two weeks.

Will continue to push and follow through on this matter."

22 Hearings 10369-73, 21 Hearings 9793 (Testimony of Caulfield).

135. Lawrence J. Higby, former deputy assistant to President Nixon, testified before the Watergate Committee that prior to the publication of the *Newsday* series, John Dean sent a memorandum or two to H.R. Haldeman updating Haldeman on the status of the *Newsday* investigation. 23 Hearings 11098, 11101 (Testimony of Higby).

136. On October 14, 1971, Jack Caulfield wrote the following memorandum to John Dean discussing the assertion that the *Newsday* article was financed by the Kennedy Foundation:

"Memorandum for John W. Dean, III

From: Jack Caulfield

Subject: Newsday Article Assertedly Financed By Kennedy Foundation

"Proving this assertion may not be possible. As you know, it is based upon Bebe's observation that Greene and Guthman are Kennedy loyalists and that Moyers is now with the Kennedy Foundation.

I cannot believe that a matter of this sensitivity would be identifiable through normal investigative technique. It seems to me that we need harder input than now at hand in order to proceed.

I would suggest, however, that consideration be given to an oblique Nofziger media drop vis a vis the Kennedys, Newsday, the L.A. Times et al—a sort of an alert that we are aware."

23 Hearings 11144.

137. Rebozo testified before the Watergate Committee that Caulfield's October 14 memo may have resulted from Rebozo's relaying to somebody at the White House that one of the hotel bills for the *Newsday* investigators may have been paid by Ted Sorensen, a former assistant to President Kennedy. 21 Hearings 10127.

138. Mr. Rebozo testified that he discussed the *Newsday* article with President Nixon, and that the article was "a topic of conversation [at the White House] because everybody had read it." Rebozo Deposition at 30-31.

139. John Dean testified before the Watergate Committee that after the *Newsday* series was published he "got instructions that one of the authors of [the *Newsday*] article [Robert W. Greene] should have some problems." Dean instructed Mr. Caulfield to find out how an IRS audit of the individual could be instituted, and the IRS audit was subsequently conducted. 3 Hearings 1072 (Testimony of Dean); 22 Hearings 10368-69, 10375-76 (Testimony of Caulfield).

[Paragraphs 140 through 165 are printed in the Appendix to the Petition for Certiorari at pages 46a-52a.]

Petitioner's Reply Brief

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CASE NO. 81-422

in the

Supreme Court

of the

United States

OCTOBER TERM, 1981

CHARLES G. REBOZO,
Respondent/Cross-Petitioner,

vs.

THE WASHINGTON POST COMPANY,
Petitioner/Cross-Respondent.

REPLY BRIEF IN SUPPORT OF CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondent/Cross-Petitioner, CHARLES G. REBOZO, (hereinafter "MR. REBOZO") submits this Reply Brief to clarify certain misconceptions raised by the Petitioner/Cross-Respondent, THE WASHINGTON POST COMPANY, (hereinafter "THE POST") in its Brief in Opposition to Cross-Petition.

I.

MR. REBOZO in his Cross-Petition does not put forth the proposition that a court shall not make initial determinations of law. What Cross-Petitioner has stated is that where there are conflicting inferences to be drawn from the facts, and the issue is one of fact and law, then a jury must make the determination of whether or not an individual is a public figure.

The public figure issue has and continues to undergo substantive changes to the point that now a number of factual questions must be answered in order to determine the status of the libel plaintiff. When this Court initially created the "public official" concept in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the determination of whether the libel plaintiff was or was not a public official, was as easy and clear to determine as answering whether or not the plaintiff was paid by the government.

The steady flow of libel cases has added significantly to the area of "public figure" law, and the list of inquiries and facts to be balanced in order to determine the libel plaintiff's status has also increased dramatically.

This is not a simple privilege question as THE POST would have this Court believe.

The decisions of this Court in *Wolston v. Readers Digest Association, Inc.*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Curtis Publishing Co. v. Butts*, 388 U.S. 139 (1967) and *Rosenblatt v. Bear*, 383 U.S. 75 (1966) have raised important factual questions to-wit:

a. does the libel plaintiff occupy a position of "persuasive power and influence";

b. what is the nature of the controversy involved;

c. has the libel plaintiff involved himself in any purposeful activity;

d. has said purposeful activity caused the libel plaintiff to thrust himself into the "vortex of an important public controversy";

e. has he done so "in order to influence the resolution of the issues involved";

f. has the libel plaintiff "engaged the public in an attempt to influence" the resolution of the issues involved;

g. has the libel plaintiff assumed a position of "especial prominence";

h. what is the nature and extent of the libel plaintiff's participation in the particular controversy giving rise to the defamation;

i. does the story revolve around the libel plaintiff's involvement in a judicial proceeding;

j. does the notoriety of the libel plaintiff stem from the public's interest;

k. has the libel plaintiff sought publicity;

l. has the libel plaintiff only sought to conduct his affairs in the normal fashion of others in his profession.

This lengthy list of questions are just some of the factual determinations to be made before an individual can be classified as a public figure.

When there are conflicting inferences to be drawn from the facts, MR. REBOZO contends that this list is too long and involves the balancing of too many facts for the court to make a determination of whether or not an individual shall be a public figure under the guidelines set forth by this Court.

THE POST in its Brief in Opposition at page 2, put forth the statement, as articulated by this Court in *Rosenblatt v. Bear*, 383 U.S. 75, 88, that there exists a possibility that a jury would use the "cloak of a general verdict to punish unpopular ideas or speakers". To allow the trial judge "in the first instance" to determine the public figure issue would, according to this Court, lessen the possibility of such a problem.

MR. REBOZO contends that the possibility of such harm is not sufficient to interfere with an individual's

right to a jury trial on this fact question. As the New Hampshire Supreme Court pointed out in *McCusker v. Valley News*, ____ N.H. ____, 428 A.2d 493 (1981), in speaking to this Court's concern over the possibility that a jury would be influenced by the views of a defendant and its publication, stated that "this concern can be dispelled by careful instructions to the jury and by use of a special verdict. . . ." *Id.* at 495.

The artificial spectre of such a problem is merely that, and should not be used to justify the infringement of a libel plaintiff's right to a jury trial.

In further support of that contention, MR. REBOZO would again analogize to the line of pornography cases wherein a jury has been allowed to determine within judicially-determined guidelines, what is and is not obscene and offensive, according to community standards. See *Smith v. United States*, 431 U.S. 291 (1977); *Hamling v. United States*, 418 U.S. 87 (1974); *Miller v. California*, 413 U.S. 15 (1973). As Judge Skelly Wright noted in *Reed Enterprises v. Corcoran*, 354 F.2d 519, 522 (D.C. Cir. 1965), the alleged obscenity of a publication is a mixed question of fact and law "which should be submitted to the jury under proper jury instructions."

The Cross-Petitioner contends that where there are conflicting inferences to be drawn from the facts, as is the case here, the public figure issue can and must be determined by a jury as provided by the seventh amendment under proper guidelines and instructions by the court.

II.

In its Brief in Opposition, it appears that THE POST's main argument in support of its contention that MR. REBOZO is a public figure appears to be the shear number of times that the Cross-Petitioner's name is mentioned in the media. The lengthy list of "facts" cited by THE POST are also presented in the light most favorable to THE POST, not the standard to be utilized for summary judgment.

The decisions of the lower courts in this case are of paramount importance. The district court held that MR. REBOZO was a public figure "for all purposes and in all context" or in the alternative a public figure "for the limited range of issues related to banking". The court of appeals took a much more restrictive view of MR. REBOZO's position, holding that he was a public figure "for the purposes of this litigation . . . at the time this article was published". *Rebozo v. The Washington Post Company*, 637 F.2d 375, 380 (5th Cir. 1981).

THE POST attempts to focus this Court's attention on the holding of the district court rather than that of the court of appeals. In its Brief in Opposition at page 8, THE POST states that it submits

> and the District Court held that REBOZO is one of the few libel plaintiffs who has "achieve[d] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts."

Cross-Petitioner urges that MR. REBOZO's position (if he had any position at all) stems directly from his friendship with ex-president Richard M. Nixon. To determine that he was a person of such persuasive or pervasive fame and influence, this Court would have to answer the question which the court of appeals declined to decide, to-wit: "whether a confidential relationship with the president of the United States automatically converts one into a public figure". *Rebozo v. The Washington Post Company*, 637 F.2d 375, 379 (1981).

The Cross-Petitioner, a South Florida banker who happens to be a friend of the ex-president of the United States, cannot, under the cases enunciated by this Court, be considered a public figure for all purposes and in all contexts because MR. REBOZO is not an individual of such persuasive power and influence. In order to decide this question (other than by deciding that all confidential relations with the President of the United States renders one a public figure) the trial court would have to hear testimony from former President Nixon as to the "persuasive power and influence" which MR. REBOZO exercised over him.

If such testimony is necessary, the public figure determination cannot be made at summary judgment.

If this Court should decline to decide the question of whether or not a confidential relationship with the president of United States converts one into a public figure, then the only determination that can be made is whether or not Cross-Petitioner is a limited public figure.

THE POST however admits in its Brief in Opposition at page 9, that "[h]is prominence, after all, did not stem from his involvement in one 'particular public controvers[y]' ". Clearly, THE POST is correct in its statement that MR. REBOZO did not thrust himself into the "vortex" of any important public controversy, nor did he engage the public in an attempt to influence public opinion, nor did he thrust himself into the lawsuit which was the subject matter of the allegedly defamatory article.

Cross-Petitioner acknowledges the need of the press to have "breathing space" to comment on our government leaders. However, Cross-Petitioner reiterates the need for this Court to recognize a "zone or sphere of influence" wherein any individual who expressly or impliedly injects himself into this "sphere" by associating with, e.g., the President would be considered a limited public figure for the purpose of media comment upon the activities which take place within that sphere. Utilizing such a test MR. REBOZO would not be a public figure for the purposes of the article which is a subject matter of this libel action.

THE POST's assertion that there is support in previous case law for holding that MR. REBOZO is a public figure is unfounded. It may be true as stated in THE POST's Brief in Opposition at page 9 that "the public and the press were interested in all phases of MR. REBOZO's life" but this Court has specifically stated that public interest is not enough to create a public figure. Nor should the shear number of times that someone has been mentioned fleetingly in newspaper articles create a public figure.

CONCLUSION

For the foregoing reasons, the Cross-Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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